Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Empowering Parents and Protecting Children in an Evolving Media Landscape	)	MB Docket No. 09-194
	)	
	)	

COMMENTS OF
THE PROGRESS & FREEDOM FOUNDATION ("PFF"),
& THE ELECTRONIC FRONTIER FOUNDATION ("EFF")

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EXECUTIVE SUMMARY

Offering joint comments in response to the Public Notice in the matter, *Empowering Parents and Protecting Children in an Evolving Media Landscape*,[i] The Progress & Freedom Foundation and the Electronic Frontier Foundation highlight four key areas of concern:

The FCC's Jurisdiction

The Commission asks "whether [it] has the statutory authority to take any proposed actions [to regulate electronic media platforms]."[ii] In short, the answer is no. The Commission has no authority over Internet media whatsoever. Under the Telecommunications Act of 1996 and the Children's Television Act of 1990, the Commission has only the authority to regulate broadcast and cable television. The Commission has received no grant of authority from Congress to regulate the Internet; indeed, as part of Section 230 of the Communications Decency Act of 1996, Congress recommended a minimum of government regulation for the Internet while maximizing availability of user control technologies. For the Commission to proceed any further with its interest in regulating Internet media would be to act directly contrary to the expressed wishes of Congress.

Finally, if Congress were to instruct an agency to even consider regulation of new media content for the benefit of children, it would likely select the Federal Trade Commission, which is already charged with administering the Child Online Privacy Protection Act (COPPA) and has general jurisdiction over unfair and deceptive trade practices.

The First Amendment

The Commission also asks "whether [any proposed actions to regulate electronic media platforms] would be consistent with the First Amendment."[iii] Again, the answer is no. The rationale that supports the Commission's authority to regulate broadcast television depends in part upon the traditional television viewer's inability to control the content he receives over the airwaves. While lack of individual control was held to have justified government regulation of broadcast content, there is no such lack of control in the context of Internet media. A wide variety of currently available user empowerment tools enable parents to exercise a high degree of control over the content their children have access to. This type of targeted blocking by parents for their own children will always represent a less restrictive means to which government regulation must yield under the First Amendment. Further, minors have their own First Amendment rights both to speak and to receive speech, making government action to control minors' access to speech difficult to justify under the Constitution.

Additionally, any government mandate on content creators, website operators, or access providers to rate, flag, or tag content would constitute compelled speech and would

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[ii] Federal Communications Commission, *Notice of Inquiry In the Matter of Empowering Parents and Protecting Children in an Evolving Media Landscape*, MB Docket No. 09-194, FCC 09-94, ¶ 9 (rel. Oct 23, 2009) ("*Empowering Parents Notice*").

[ii] *Id.* ¶ 9.

[iii] *Id.* ¶ 9.

violate the First Amendment. The government may not require content creators to label their speech, and also may not co-opt private industry rating systems for its own use. Any rating and labeling system developed by the government would necessarily be subjective, and would likely be so complex as to function as a prior restraint on speech.

User Empowerment Tools and Technology

The Commission seeks comment on the awareness, adoption, and use of parental control technologies.[iv] Before the Commission can consider this data, however, it should first realize that only a small percentage of American households even want or need such technologies. Only one third of households include children under the age of 18, and homes with older teens or very young children will have different parental control technology needs than those with adolescents. Further, many parents employ non-technological solutions such as household media rules. Parents who do seek out control technologies can choose from an ever-expanding array of tools, which are increasingly simpler to use and more effective.

The Commission also asks whether "the creation of a uniform rating system that would apply to various platforms [would] be an appropriate objective."[v] Even imperfect voluntary ratings systems or tools are preferable to government regulation. Content rating systems are inherently subjective, and while private ratings systems can take measures to avoid undue influence from special interest groups, the necessarily open and public process behind a government ratings system would render it vulnerable to the "heckler's veto." A government-run rating system that sought to regulate Internet content would be both overwhelmed with the amount of material generated by U.S.-based content producers and also unable to reach the incredible amount of content created outside of its jurisdiction that is equally accessible online. Private ratings systems face no such limitation. Further, independent ratings systems, which may classify content across media, and user-generated metadata tagging systems allow parents to supplement private ratings with more individually tailored evaluations of content.

Children's Programming & Advertising

The Commission asks "[w]hat actions, if any, should government take to create incentives to limit the exposure of children to advertisements,"[vi] and "[i]s it feasible to block advertisements that may be inappropriate for children on various media platforms?"[vii] The Commission should tread exceedingly cautiously in this area because, in addition to its lack of jurisdiction and the First Amendment concerns raised above, increased regulation of advertising negatively impact the production of media content in general, and children's programming in particular. The vast majority of media content production (especially online) is supported by advertising or distributed through advertising-supported platforms such as YouTube. Advertising plays an important role in promoting marketplace competition and lowering prices for consumers, including for children's products, and can serve to provide

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[iv] *Empowering Parents Notice*, ¶ 44.

[v] *Empowering Parents Notice*, ¶ 48.

[vi] *Empowering Parents Notice*, ¶ 38.

[vii] *Empowering Parents Notice*, ¶ 40.

important and useful information to consumers. A number of ad-blocking technologies already empower parents to control their children's exposure to advertising, thus providing less restrictive means than government regulation. COPPA already requires parental consent for the collection of personal information from children under 13 through sites and services directed at children, and parents already have access to a number of resources they can use to restrict the ability of advertisers to collect information from their children. The Federal Trade Commission is currently investigating whether and how the government might support further development and adoption of such tools.

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& The Electronic Frontier Foundation ("EFF")

I. Introduction

The Progress & Freedom Foundation ("PFF") and the Electronic Frontier Foundation ("EFF") hereby offer comments in response to the Public Notice in the above-captioned matter, *Empowering Parents and Protecting Children in an Evolving Media Landscape*.[1]

Much of what follows is taken from PFF's earlier comments to the FCC in the *Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming*,[2] and filings in that proceeding by EFF[3] as well as a PFF Special Report, *Parental Controls & Online Child Protection: A Survey of Tools and Methods.*[4] That report is updated frequently to take into account the rapidly-evolving marketplace for parental control tools and methods.

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1 Federal Communications Commission, *Notice of Inquiry In the Matter of Empowering Parents and Protecting Children in an Evolving Media Landscape*, MB Docket No. 09-194, FCC 09-94 (rel. Oct 23, 2009) ("*Empowering Parents Notice*"), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-94A1.pdf.

2 Adam Thierer, The Progress & Freedom Foundation, *Comments in the Matter of Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming*, MB Docket No. 09-26, April 15, 2009, www.pff.org/issues-pubs/filings/2009/041509-%5BFCC-FILING%5D-Adam-Thierer-PFF-re-FCC-Child-Safe-Viewing-Act-NOI-%28MB-09-26%29.pdf ("*PFF CSVA Filing*"). *See also* Federal Communications Commission, *Notice of Inquiry In the Matter of Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming*, FCC 09-14, MB Docket No. 09-26, March 2, 2009 ("*CSVA Notice*").

3 Lee Tien & Seth Schoen, Electronic Frontier Foundation, Reply Comments in the Matter of Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming, MB Docket No. 09-26, May 18, 2009 ("*EFF CSVA Filing*"), http://fjallfoss.fcc.gov/ecfs/document/view?id=6520216901.

4 Adam Thierer, The Progress & Freedom Foundation, *Parental Controls and Online Child Protection: A Survey of Tools and Methods*, Version 4.0 (2008) ("*PFF Parental Controls Report*"), www.pff.org/parentalcontrols.

First, as a threshold matter, the Commission should be cautious about the rhetoric it uses when addressing online child safety issues. It is not constructive for the Commission, at the outset of the Inquiry, to demonize the use of electronic media technologies as presenting "inherent risks."[5] The opportunities and benefits for minors of one of the primary "electronic media technologies"—the Internet—far outweigh the risks. The educational and cultural resources that the Internet has laid open to young people are vast and unprecedented, and have dramatically increased minors' ability to learn from other people all around the world. As this generation of young Americans enters the work force, their mastery of the resources made available by the Internet will surely play a huge role in their success in the global economy.

The benefits of the Internet can scarcely be overstated, and should not be treated as secondary to its possible risks, which have been overinflated in the popular media and among some policymakers. The academic research indicates that (a) most minors are safe online, (b) risks online are not greater than risks minors face offline, (c) most minors who get in trouble online are those who are "at risk" or in trouble offline as well, and (d) minors are as likely to access sexual content offline as online. The Final Report of the Harvard Berkman Center's Internet Safety Technical Task Force (on which PFF served) provides a comprehensive overview of the current academic research on online safety issues.[6] That Report's conclusions were in line with several other major online safety task forces.[7]

Notwithstanding the research showing that minors are relatively safe online, both media and policymakers have created what academics call a "moral panic" about the risks to minors online – leading to policy overreactions about online safety.[8] The Commission should be cautious to avoid the rhetoric of fear that swirls around the issues raised in this proceeding, both because it increases the chance of ill-considered policy decisions about the Internet, and because it sends a harmful message to the parents of America—that the Internet is an evil from which they should shield their children. The Commission should instead emphasize the extraordinary benefits that the Internet offers, while helping to educate parents to the fact that—like the offline world—there are risks online which both parents and children should understand.

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5 *Empowering Parents Notice*, *supra* note 1, ¶¶ 1, 4.

6 *See Enhancing Child Safety and Online Technologies*, Final Report of the Internet Safety Technical Task Force to the Multi-State Working Group on Social Networking of State Attorneys General of the United States (Dec. 31, 2008), *available at* http://cyber.law.harvard.edu/pubrelease/isttf/.

7 *See* Adam Thierer, *Five Online Safety Task Forces Agree: Education, Empowerment & Self-Regulation Are the Answer*, Progress on Point 16.13, July 8, 2009, *available at* http://www.pff.org/issues-pubs/pops/2009/pop16.13-five-online-safety-task-forces-agree.pdf

8 *See* Adam Thierer, Technology Liberation Front, *Technopanics and the Great Social Networking Scare*, July 10, 2008, *available at* http://techliberation.com/2008/07/10/technopanics-and-the-great-social-networking-scare/ (discussing academic analysis of "moral panics" relating to online child safety).

II. The Commission Has Extremely Limited Authority in This Area

A. The FCC Has No Authority over Internet Media

"The FCC, like other federal agencies, literally has no power to act … unless and until Congress confers power on it."[9] The Inquiry invokes (by reference) two statutes, neither of which gives the Commission authority to regulate Internet video programming or other online media. First, the Telecommunications Act of 1996 authorized the Commission to require the incorporation of the "V-Chip" to "enable viewers to block display of all programs with a common rating," but only for "*televisions* designed to receive television signals."[10] Second, and more importantly, is the Children's Television Act of 1990, which gives the Commission authority to "prescribe standards applicable to commercial television broadcast licensees [including cable] with respect to the time devoted to commercial matter in conjunction with children's *television* programming."[11]

In 2004, the Commission extended those obligations to Direct Broadcast Satellite (DBS) Operators, which had by then reached a 20% share of the Multichannel Video Programming Distributor (MVPD) market. The Commission did so because it agreed with comments filed by the Center for Media Education that, (i) "from the consumer's perspective, DBS providers deliver the same service as cable operators and broadcasters," (ii) because of the "growth, penetration level, and technological advances of DBS," and (iii) "the benefits of imposing commercial limits on children's programming outweigh the potential burdens."[12] Specifically, the Commission feared that "[a] blanket exemption for DBS would expose a significant number of children to the risk of over-commercialization, contrary to Congress' intent in enacting the Children's Television Act of 1990."[13]

But even if the Commission concluded, as a policy matter, that expanding the CTA to cover Internet media might be as desirable today as expanding the CTA to cover DBS was in 2004, one crucial distinction prevents the FCC from regulating children's programming (or promoting "beneficial" children's programming) online. The Commission's 2004 decision to extend CTA obligations to DBS operators was grounded not merely in utilitarian policy considerations but in clear, pre-existing statutory authority over DBS. Specifically, the Commission had previously concluded (in 1998) that Congress gave the agency authority "to impose other public interest programming requirements on DBS providers as part of their general obligations as FCC licensees, including guidelines concerning the commercialization of

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[9] *American Library Ass'n v. Federal Communications Comm'n*, 406 F.3d 689, 698 (D.C. Cir. 2005).

[10] Telecommunications Act of 1996, Public Law 104-104, § 551(c) (1996) (codified at 47 U.S.C. § 303(s)) (emphasis added) ("*1996 Telecommunications Act*").

[11] Children's Television Act of 1990, 101 P.L. 437, codified at 47 U.S.C. §§ 303a, 303a, 394; *see also* 47 C.F.R. § 25.701(e) (emphasis added).

[12] Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Interest Obligations, Sua Sponte Reconsideration, 19 FCC Rcd 5647, ¶ 48 (2004) ("DBS CTA Order") (extending commercial limits rules to DBS operators). The term "MVPD" include cable operators, Direct Broadcast Satellite ("DBS") providers, etc. *See* 47 U.S.C. § 522(13).

[13] DBS CTA Order, *supra* note 12, ¶ 48.

children's programming" as part of the Cable Act of 1992.[14] That statutory grant left it to the Commission's discretion as to which public interest requirements should be imposed on DBS.[15]

By contrast, Congress has *never* given the FCC authority to impose traditional "public interest"-based regulations on the Internet. Indeed, the general framework for Internet governance explicitly laid down by Congress takes precisely the opposite approach. In Section 230 of the Communications Decency Act of 1996, Congress found that:

> (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an ***extraordinary advance in the availability of educational and informational resources to our citizens***.
>
> (2) These services offer users a ***great degree of control over the information that they receive***, as well as the potential for even greater control in the future as technology develops.
>
> (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, ***unique opportunities for cultural development, and myriad avenues for intellectual activity***.
>
> (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a ***minimum of government regulation***.[16]

Thus, Congress concluded that it would be the "policy of the United States":

> (1) to ***promote the continued development of the Internet*** and other interactive computer services and other interactive media;
>
> (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, ***unfettered by Federal or State regulation***;
>
> (3) to ***encourage the development of technologies which maximize user control*** over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;[17]

In other words, Congress has already decided that the proper approach to concerns raised by the Internet is not to regulate, but to promote user empowerment technologies.[18]

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[14] DBS CTA Order, *supra* note 12, ¶¶ 44-45 (discussing Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992); *see also* Direct Broadcast Satellite Public Interest Obligations, Report and Order, 13 FCC Rcd 23254 (1998).

[15] 47 U.S.C. § 335(a).

[16] 47 U.S.C. § 230(a)(1-4) (emphasis added).

[17] 47 U.S.C. § 230(b)(1-3) (emphasis added).

[18] Of course, it is important to note that Section 230 is an aspirational, hortatory declaration of policy, rather than a source of statutory authority in its own right. *See* Barbara Esbin & Adam Marcus, *The Law is Whatever the Nobles Do: Undue Process at the FCC*, Commlaw Conspectus 535, 563-610 (2009) ("*Undue Process"*).

The Commission is, of course, well within its power to ask how the changing media landscape has affected implementation of the Children's Television Act. Indeed, one might fairly ask whether the CTA is still necessary in an era of staggering media abundance, including educational content for children. That content is available through a wide variety of channels and is produced far beyond the CTA requirements in response to marketplace demand from parents for content for their children.[19]

But given the Commission's clear lack of authority to expand the Children's Television Act and Congress's equally clear intention that the Internet remain free of traditional media regulation, the present NOI can only be described as regulatory overreaching. EFF commended the Commission for its self-restraint in the CSVA NOI, where it limited its inquiry to the matters set forth by Congress without asserting new regulatory authority.[20] Unfortunately, we cannot do the same here.

As the Supreme Court has made clear, "the Commission was not delegated unrestrained authority" and does not have "unbounded" jurisdiction.[21] Even ancillary jurisdiction must be "ancillary" to some express grant of statutory authority.[22] The Commission itself noted in its recent Net Neutrality Notice of Proposed Rulemaking that it "may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission's general jurisdictional grant under Title I covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."[23] As noted above, the Commission has been given no authority to regulate video or other media online.

Indeed, if ancillary jurisdiction could have justified regulation of children's video programming under the Communications Act of 1934, there would have been no need for Congress to enact the Children's Television Act—or for the Commission to ground its decision to impose CTA regulations on DBS operators in the statute specifically authorizing the Commission to impose public interest obligations on them. The CTA itself could scarcely be more plain in its limitation to "children's television programming" distributed by "broadcast licensees" and "cable operators."

Remarkably, the NOI attempts to sidestep the threshold jurisdictional issue by seeking comment on whether statutory and constitutional authority exists in the first place. But the

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19 *See, e.g.*, Adam Thierer, The Progress & Freedom Foundation, *We Are Living in the Golden Age of Children's Programming*, Progress Snapshot 5.6, July 2009, www.pff.org/issues-pubs/ps/2009/ps5.6-childrens-television-golden-age.html.

20 *EFF CSVA Filing*, *supra* note 3, at 7

21 *Federal Communications Comm'n v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979).

22 *See American Library Ass'n. v. FCC*, 406 F. 3d 689, 692 (D.C. Cir. 2005) ("There is no statutory foundation for the broadcast flag rules, and consequently the rules are ancillary to nothing."); *see also EFF Comments, In the Matter of Preserving the Open Internet Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52 (Jan. 14, 2010), at 7 ("*EFF Net Neutrality Comments*"), www.eff.org/files/filenode/nn/EFFNNcomments.pdf.

23 Notice of Proposed Rulemaking, *In the Matter of Preserving the Open Internet Broadband Industry Practices*, FCC No. 09-93, ¶ 133 ("Net Neutrality NPRM"). *See* generally *Undue Process*, *supra* note 18 at 563-610.

Commission cannot simply re-write statutes to expand the agency's regulatory powers. The prospect of unelected Commissioners regulating the Internet without statutory constraint poses an intolerable risk to free speech and online innovation.[24]

This is not to say, of course, that regulatory agencies should never be able to inquire about whether their statutory authority should be re-examined and even expanded, nor that Congress should be expected to understand exactly how the statutes it enacts will fare in the midst of ongoing technological change and anticipate every potentially necessary change without advice from the regulatory agencies that administer those statutes. After all, Congress creates regulatory agencies not just to develop and implement regulation, but also to develop expertise in particularly complex and specialized areas of law. Congress's decision about whether to implement new statutory authority over children's programming in new media may well be strongly influenced by the FCC's expert advice.

But, if Congress wanted that advice, it could have asked the Commission for it. Congress could have solicited the agency's opinion in the form of a written report—exactly as Congress did when with the Child Safe Viewing Act, which asked specific, carefully focused questions whose scope was far narrower than this inquiry.[25] Similarly, Congress in 2009 asked the FCC to draft a National Broadband Plan, including the agency's expert recommendations to inform Congress's consideration of possible legislation. More recently, Congress asked the Federal Trade Commission to prepare a study on the child safety and protection issues raised by virtual worlds. But Congress did not request this Inquiry and has not authorized the Commission to ask the broad questions about potential new regulations it is asking here. The CSVA inquiry covered only some of the broad questions asked in the current notice, while many other questions (*e.g.*, about expanding the CTA) go well beyond the scope of the CSVA Inquiry.

Or, Congress could have convened hearings on the matter and invited the Commission to testify about what the agency thinks its current authority is (based on advice from FCC's Office of General Counsel—rather than public commenters) and whether it is inadequate. Other interested parties could submit their own comments about Commission's current jurisdiction in this area (or lack thereof) and offer suggestions as to whether the Commission should be given new jurisdiction.

Until an act of Congress explicitly grants the Commission authority to regulate Internet-distributed video programming, games, virtual worlds, other media geared towards children, or other Internet-distributed media the agency deems "beneficial," the Commission cannot act in this area. (Indeed, it is difficult to see how, as a practical matter, the CTA's approach could be applied to Internet media without a full-blown licensing scheme for Internet websites and applications like that for traditional media distributors. Not only would it require the FCC to regulate far outside of its statutory authority, but the FCC would somehow have to claim jurisdiction far outside of this country's borders.)

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[24] *See EFF Net Neutrality Comments, supra* note 22 at 8.

[25] *See CSVA Notice*, *supra* note 2; *see also Child Safe Viewing Act of 2000*, S. 602, 110th Cong. (2008), available at http://thomas.loc.gov/cgi-bin/query/D?c110:6:./temp/~c110RqzOMN:: (*CSVA*).

Moreover, in this case it is not even clear that, if any agency should be regulating—or even considering regulating online video or other media—the FCC is the agency best qualified to do so. If there is an agency with special expertise in Internet content and services, it is arguably the Federal Trade Commission, not the FCC. It is the FTC that administers the Child Online Privacy Protection Act (COPPA), which limits the collection of personal information about, and marketing to, children under the age of thirteen.[26] And the FTC is already considering guidelines related to food marketing to children.[27]

As noted below, Congress has already asked the FTC to study the issue of child safety and protection in online virtual worlds, and the FTC has been conducting an extensive series of workshops on online privacy.[28] The best way to avoid conflicts among Congress's servants is for those servants to leave the question of task-assignment to their common master—our elected representatives in Congress. That is especially the case in light of the FCC's censorial powers, which raise profound First Amendment concerns.

B. The New Regulations Proposed in the Notice Likely Infringe on First Amendment Rights

The problems raised by this Inquiry are not merely jurisdictional. Even if Congress granted the FCC expanded regulatory authority over Internet media, the kinds of new regulation hinted at in the Notice would very likely violate freedom of speech. Thus, the Inquiry contemplates not only an inappropriate extension beyond the agency's current jurisdiction, but also an infringement on the First Amendment rights of Internet speakers and users.

For instance, any requirement that a content creator, content provider, or service provider rate, flag, or tag online content would be plainly unconstitutional under the First Amendment. The government lacks constitutional power to require content creators or providers to "label" or "rate" their content. The Supreme Court has made clear that "[j]ust as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views."[29] A content label is exactly the type of subjective "compelled" speech that the First Amendment prohibits.[30] See below, Section V, for further discussion of mandatory ratings and labels.

In considering the effectiveness of various blocking controls or parental control tools, the Commission should consider the extent to which mandated regulatory alternatives might raise serious First Amendment objections and, consequently, be the subject of court challenges.

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[26] 15 U.S.C. §§ 6501-6508.

[27] Interagency Working Group on Food Marketed To Children, Tentative Proposed Nutrition Standards, Dec. 15, 2009, http://ftc.gov/bcp/workshops/sizingup/SNAC_PAC.pdf

[28] Privacy Roundtable Series, www.ftc.gov/bcp/workshops/privacyroundtables/.

[29] *United States v. United Foods, Inc*., 533 U.S. 405, 410 (2001) (citations omitted).

[30] *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc*., 487 U.S. 781, 795, 797-98 (1988); *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 18 (1986); *Video Software Dealers Association v. Schwarzenegger*, 556 F.3d 950, 965-967 (9th Cir. 2009) (rejecting California's violent video game labeling requirement even on the assumption that video game packaging was commercial speech); *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006).

That's especially the case in light of recent First Amendment case law emanating from the Internet and video game sectors.

1. Modern First Amendment Jurisprudence Has Acknowledged New Technological Capabilities for Individual / Household Empowerment as Less Restrictive Means than Government Regulation

Until the modern era of technology development, it had been difficult for individual households to tailor media content to their specific needs or values. In essence, the off button on TVs and radios was the only technical control at a parent's disposal in the analog era. In that environment, many believed that government needed to act as a surrogate for parents because of the lack of control families had over their media decisions and encounters. In other words, because it was difficult for families to enforce their own "household standards," the government would step in and create a baseline—quite amorphous and sometimes completely arbitrary—"community standard" for the entire nation. That community standard would be enforced by law and treat all households as if they had the same tastes or values.

For example, in the context of broadcast television and radio programming, the Supreme Court famously held in *FCC v. Pacifica* (1978) that FCC oversight and regulatory penalties (e.g., fines or license revocation) would help prevent "uninvited" programming from acting as an "intruder" into the home.[31] By a slim 5-4 margin, that logic became the law of the land for broadcasting. The Commission's regulatory powers in this field are still driven by that logic even though its scope and continued relevance continue to be hotly contested in the courts.

Similar arguments were put forward by policymakers in the mid-1990s when they sought to impose restrictions on Internet and video game content. Courts, however, have rejected these efforts. In striking down the Communications Decency Act's effort to regulate underage access to adult-oriented websites, the Supreme Court declared in 1997 in *Reno v. ACLU* that a law that places a "burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving" the same goal.[32] The courts have repeatedly found that education and empowerment, of parents, children and educators themselves, constitutes a "less restrictive" alternative to regulation. And several lower courts have rejected regulation of video game content on similar grounds.[33]

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[31] *FCC v. Pacifica*, 438 U.S. 726 (1978).

[32] *Reno v. American Civil Liberties Union*, 521 US 844, 874 (1997).

[33] S*ee, e.g., Schwarzenegger*, *supra* note 30, 556 F.3d at 965-967; *Blagojevich*, 469 F.3d at 652; *Interactive Digital Software Association, et. al. v. St. Louis County, et. al.,* 329 F.3d 954 (8 Cir. 2003); *American Amusement Machine Association, et al. v. Kendrick, et al.*, 244 F.3d 572 (7th Cir. 2001); *Entertainment Software Ass'n v. Granholm*, 426 F Supp 2d 646 (E.D. Mich. 2006); *Video Software Dealers Association, et. al. v. Maleng, et. al.*, 325 F. Supp.2d 1180 (W.D. Wa. 2004). *See generally* Adam Thierer, The Progress & Freedom Foundation, *Fact and Fiction in the Debate Over Video Game Regulation*, Progress on Point 13.7, March 2006, at 13-18 www.pff.org/issues-pubs/pops/pop13.7videogames.pdf (discussing cases striking down state video game laws); Henry Cohen, *Constitutionality of Proposals to Prohibit the Sale or Rental to Minors of Video Games with Violent or Sexual Content or 'Strong Language*, Congressional Research Service, U.S. Library of Congress (Jan. 12, 2006), *available at* http://digital.library.unt.edu/ark:/67531/metacrs9144/m1/1/high_res_d/.

Indeed, many "less restrictive alternatives" are available to parents today to help them shield their children's eyes and ears from content they might find objectionable, regardless of what that content might be—from pornography to violence to unwelcome commercial messages. If it is the case that families now have the ability to effectively tailor media consumption to their own preferences—that is, to craft their own "household standards"—the regulatory equation should also change: Regulation can no longer be premised on the supposed helplessness of households to deal with content flows if families have been empowered and educated to make content determinations for themselves. As the Supreme Court held in its 2000 decision in *United States v. Playboy Entertainment Group*, "[t]echnology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us."[34]

In that decision, the Supreme Court confirmed that this would be the new standard to which future government regulations of media content would be held. The Court struck down a law that required cable companies to "fully scramble" video signals transmitted over their networks if those signals included any sexually explicit content. Echoing its earlier holding in *Reno v. ACLU*, the Court found that "less restrictive" means were available to parents looking to block those signals in the home. Specifically, in the *Playboy* case, the Court argued that:

> [T]argeted blocking [by parents] enables the government to support parental authority without affecting the First Amendment interests of speakers and willing listeners—listeners for whom, if the speech is unpopular or indecent, the privacy of their own homes may be the optimal place of receipt. Simply put, targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests.[35]

More importantly, the Court held that:

> It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.[36]

Thus, the Supreme Court has set a high bar for policymakers seeking to regulate modern media content. Not only is it clear that the Court is unlikely to allow the extension of broadcast-era content regulations to new media outlets and technologies, but it appears certain that judges will apply much stricter constitutional scrutiny to all efforts to regulate speech and media providers in the future, including broadcasting. As constitutional law scholar Geoffrey R. Stone of the University of Chicago School of Law has noted:

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[34] *United States v. Playboy Entertainment Group*, 529 U.S. 803, 818 (2000).

[35] *Id.* at 815.

[36] *Id.* at 824.

> The bottom line, then, is that even in dealing with material that is "obscene for minors," the government cannot directly regulate such material.... Rather, it must focus on empowering parents and other adults to block out such material at their own discretion, by ensuring that content-neutral means exist that enable individuals to exclude constitutionally protected material they themselves want to exclude. Any more direct regulation of such material would unnecessarily impair the First Amendment rights of adults.[37]

2. Minors Have First Amendment Rights that Must Be Respected

Moreover, as EFF noted in its CSVA reply comments, minors themselves enjoy First Amendment rights, both to speak and to receive speech.[38] These rights are not derivative of their parents' or guardians' rights, but are the individual minors' personal rights. Minors "are 'persons' under our Constitution… possessed of fundamental rights which the state must respect,"[39] and "are entitled to a significant measure of First Amendment protection."[40]

Both common sense and case law tell us that there is a world of difference between 8- and 16-year-olds; "constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."[41] Indeed, mature minors possess close to the "full capacity for individual choice which is the presupposition of First Amendment guarantees."[42] In a case involving the constitutionality of regulating video games, Judge Richard Posner made clear that "children have First Amendment rights."[43] These rights, Posner noted, are the foundation for the very heart of First Amendment protection: an informed and critical electorate.[44] These rights must also be considered when evaluating government efforts at media content regulation.

Finally, because the vast majority of content for which blocking technologies are being considered here would be non-obscene in character, the constitutional bar would be even higher. While the government may ban material that is adjudicated to be obscene, material that merely focuses on "deeds of bloodshed, lust or crime" is "as much entitled to the protection of free speech as the best of literature."[45]

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[37] Geoffrey R. Stone, *The First Amendment Implications of Government Regulation of 'Violent' Programming on Cable Television*, National Cable and Telecommunications Association, Oct. 15, 2004 at 10, www.ncta.com/ContentView.aspx?hidenavlink=true&type=lpubtp5&contentid=2881

[38] *EFF CSVA Filing*, *supra* note 3, at 3-6.

[39] *Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503, 511 (1969); *see* Planned *Parenthood v. Casey*, 505 U.S. 833, 899 (1992) (parental consent statute must contain method by which minor can obtain abortion without parental consent); *In re Gault*, 387 U.S. 1, 13 (1967) (minors' right to criminal due process).

[40] *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-213 (1975) (citation omitted).

[41] *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (minors' right to abortion).

[42] *Bellotti v. Baird*, 443 U.S. 622, 635 n.13 (quoting *Ginsberg v. New York*, 390 U.S. 629, 649 (1968)).

[43] *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 576 (7th Cir. 2001), cert. denied, 534 U.S. 994 (2001).

[44] *Kendrick*, 244 F.3d at 577.

[45] *Winters v. New York*, 333 U.S. 507, 513 (1948); *Cohen v. California*, 403 U.S. 15, 25 (1971) ("it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental

The Inquiry repeatedly raises the question of the effects on minors of exposure to violent content, but the government is quite limited in its ability to regulate such speech. That the speech may be viewed by children does not significantly change the analysis; speech can only acquire "harmful-to-minors" (HTM) status as a result of sexual content. Courts have repeatedly held that nonsexual depictions of violence are not covered by the HTM doctrine and are just as constitutionally protected for minors (against state action) as they are for adults. A series of court decisions, for example, has repeatedly invalidated state attempts to regulate minors' access to violent video games.[46] In particular, the courts have generally overturned video game regulations when they were based on content concerns other than the HTM standard, such as violence.[47] For instance, California's "violent video game" law was recently found unconstitutional in large part because violence is not part of the HTM doctrine.[48]

Furthermore, concepts familiar to First Amendment content regulation do not translate well into new media. For instance, the notion of judging a work "as a whole is familiar in other media, but more difficult to define on the World Wide Web. It is unclear whether what is to be judged as a whole is a single image on a Web page, a whole Web page, an entire multipage Web site, or an interlocking set of Web sites."[49]

C. Commercial Speech Is Not Wholly Without Constitutional Protection

Although the debate about the First Amendment treatment of commercial speech (and even its precise definition) continues to rage, it should be noted that the Supreme Court has made it clear commercial speech is deserving of First Amendment protection like other forms of speech. Several Supreme Court decisions over the past four decades have highlighted the important role that advertising and marketing plays in facilitating the flow of information that is beneficial to society.[50] "Both the individual consumer and society in general may have strong

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officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.").

[46] *See supra* note 33.

[47] As the Eighth Circuit has summarized the Supreme Court's case law:

> [E]xpression which is not obscene for adults may be obscene for children if the expression bears certain indicia of obscenity when examined from a minor's point of view. *Ginsberg v. New York*, 390 U.S. 629, 636-37 (1968). Obscenity, however, encompasses only expression that "depicts or describes sexual conduct." *Miller v. California*, 413 U.S. 15, 24 (1973); *see Roth v. U.S.*, 354 U.S. 476, 487 (1957); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, n.10 (1975) (expression must be erotic to be obscene). Material that contains violence but not depictions or descriptions of sexual conduct cannot be obscene. *Sovereign News Co. v. Falke*, 448 F. Supp. 306, 394 (N.D. Ohio 1977). Thus, videos depicting only violence do not fall within the legal definition of obscenity for either minors or adults.

Video Software Dealers Ass'n v. Webster, 968 F2d. 684, 688 (8th Cir. 1992) (full internal citations added).

[48] *Schwarzenegger*, 556 F.3d at 959-961.

[49] *Ashcroft v. ACLU*, 535 U.S. 564, 592-593 (2002) (Kennedy, J., concurring).

[50] "Constitutional protection for advertising is explicitly based upon the idea that freedom to advertise brings benefits to markets generally, especially consumers. The central argument in Supreme Court decisions overturning restrictions on advertising is that consumers can benefit from a free exchange of information – the 'marketplace of ideas' celebrated by authors and jurists since at least the time of John Milton." John E. Calfee,

interests in the free flow of commercial information," the Court noted in *Va. Pharmacy Bd. v. Va. Consumer Council* (1976).[51] "As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate," Justice Blackmun stressed in that decision.[52]

III. The Commission Should Not Ignore the Fact That the Relevant Universe of Homes That Need Parental Control Technologies is Actually Far Smaller than Most Realize

The Commission appears to be premising its investigation on a widespread outcry for intervention. But that case has not been made. As PFF made clear in its CSVA filing,[53] not every U.S. household needs parental controls, or will even be concerned with the sort of issues that the Commission raises in this proceeding.[54] The majority of U.S. households have only adults present. Only roughly 32% of U.S. households have children present in them.[55] Moreover, the relevant universe of homes that might seek to use parental controls is likely much less than that because households with very young children or older teens often have little need for parental control technologies. Finally, some households do not utilize parental control technologies because they rely on alternative methods of controlling media content and access in the home, such as household media rules.

Consequently, policymakers should not premise regulatory proposals upon the limited overall "take-up" rate for parental control tools, since only a small percentage of homes might actually need or want them. Speech controls that reduce programming to that which is only fit for children will cast too wide a net and ensnare many adult-only households, creating serious First Amendment concerns.[56]

Fear of Persuasion: A New Perspective on Advertising and Regulation, 107-8 (Monnaz, Switzerland: Agora Association, 1997).

51 *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 765 (1976)

52 *Id.* at 763.

53 *PFF CSVA Filing*, *supra* note 2 at 8.

54 Adam Thierer, The Progress & Freedom Foundation, *Who Needs Parental Controls? Assessing the Relevant Market for Parental Control Technologies*, Progress on Point 16.5, Feb. 27, 2009, www.pff.org/issues-pubs/pops/2009/pop16.5parentalcontrolsmarket.pdf.

55 U.S. Census Bureau, 2008 Statistical Abstract of the United States, Table No. 58, *available at* www.census.gov/compendia/statab/tables/09s0058.pdf.

56 *See, e.g.*, *Reno v. ACLU*, 512 U.S. 844, 875 (1997) ("It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. . . . But that interest does not justify an unnecessarily broad suppression of speech addressed to adults. As we have explained, the Government may not 'reduce the adult population . . . to . . . only what is fit for children.' . . . 'Regardless of the strength of the government's interest' in protecting children, 'the level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.'" (internal citations omitted)).

IV. Parents & Caregivers Have Been Empowered to an Unprecedented Extent to Control Media Content and Consumption

A wide variety of tools exists that allow parents to control not just which sites their children can visit and which services they can use, but even which kinds of content they can access on those sites[57] or, in many cases, whether to block advertisements and even tracking tools associated with that content (*e.g.*, cookies).[58]

A. The Range of Tools Available Continues to Expand Rapidly

The Commission deserves credit for its *CSVA Report*, which provided a fairly comprehensive listing of the myriad tools and methods that parents and caregivers have at their disposal to effectively manage media exposure for children. Thus, we need not reiterate here the litany of tools and methods once again. A constantly updated listing can be found in PFF's special report, *Parental Controls & Online Child Protection: A Survey of Tools & Methods*, which is now in its fourth edition.[59]

As that report—and its growing size (currently 253 pages)—makes clear, this is a well-functioning marketplace. Indeed, there has never been a time in our nation's history when parents have had more tools and methods at their disposal to help them decide what constitutes acceptable media content in their homes and in the lives of their children. Parents have been empowered with technologies, strategies, and information that can help them devise and enforce a media plan for their families that is in-line with their own needs and values.

B. Household Media Rules are an Essential Part of the Story

The Commission rightly acknowledges in its *Notice* that, "One means for protecting children from the risks of electronic media consumption is for parents to establish rules governing their children's media use ("household media rules")."[60] Indeed, surveys reveal that almost all parents use some combination of household media rules to control their children's media consumption. These household media rules include: (1) "where" rules (assigning a place for media consumption); (2) "when and how much" rules (creating a media allowance); (3) "under what conditions" rules (carrot-and-stick incentives); and, (4) "what" rules (specifying the

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[57] We do not necessarily endorse any of these tools or their use for any particular purpose, but we describe them here to demonstrate that they are numerous and readily and conveniently available, and that they continue to represent a means of achieving articulated government interests at issue that is less restrictive than regulatory action. As we note above, *see supra* at 7, courts have already recognized these facts in several contexts.

[58] Whether such tools are adequate to address privacy concerns raised by data collection is a question on which our organizations may differ, but we certainly agree that the FCC has no jurisdiction over this issue and that it is ultimately the Federal Trade Commission, Congress and the courts that must evaluate these concerns—*not* the FCC. We note, again, that the FTC is already considering these issues in its "Exploring Privacy" Roundtables.

[59] Adam Thierer, The Progress & Freedom Foundation, *Parental Controls & Online Child Protection: A Survey of Tools & Methods*, Special Report, Version 4.0, Summer 2009, www.pff.org/parentalcontrols.

[60] *Empowering Parents Notice*, *supra* note 1, ¶ 43.

programming kids can and cannot watch). Many households reject technical blocking tools in favor of these household media rules; others simply shun certain media and communications technologies altogether. Importantly, this is another reason why the universe of homes that use or even need parental controls is smaller than most policymakers imagine.

C. Private Ratings and Parental Control Tools and Methods Need Not Be Perfect to be Preferable to Government Regulation

It is certainly true that rating systems are imperfect and that no parental control tool is foolproof. But, both as a policy matter and as a constitutional matter, private ratings and parental control tools need not be perfect to be preferable to government regulation.[61] As noted above, the Supreme Court made this principle very clear when addressing the adequacy of blocking tools for cable television in its *Playboy* decision in 2000.[62]

Crucially, media rating and content-labeling efforts are not an exact science; rather, they are fundamentally subjective exercises. Ratings are based on value judgments made by humans who all have different values. Those doing the rating are being asked to evaluate artistic expression and assign labels to it that provide the rest of us with some rough proxies about what is in that particular piece of art, or what age group should (or should not) be consuming it. In a sense, therefore, all rating systems will be inherently "flawed" since humans have different perspectives and values that they will use to label or classify content.

D. There Is No Reason to Believe That a Government-Mandated Solution Would Be Preferable to Private Controls.

For the reasons stated above, there will always be some critics who will argue that someone—presumably themselves or the government—can devise better ratings or controls. But, even setting aside the clear First Amendment concerns regulation would raise,[63] there is no reason to believe that the government could actually do a better job.

If the government were responsible for assigning content ratings or labels, for example, the Commission or some other regulatory agency would simply substitute their own values for those of the voluntary rating boards or other labeling organizations in existence today.

The argument that government would provide more objective ratings or effective controls is also undermined by the grim reality of special-interest politics. Government officials would be more susceptible to various interest group pressures as they were repeatedly lobbied to change ratings or restrict content based on widely varying objectives and values. Inevitably, as has been the case with the broadcast indecency complaint process in recent years, a handful of particularly vociferous groups could gain undue influence over content decisions.[64] That

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[61] *See supra* notes 35 & 36.

[62] *See supra* at 9 (discussing blocking technologies for cable television).

[63] We address these concerns in Section IV.B.4 below.

[64] Adam Thierer, The Progress & Freedom Foundation, *Examining the FCC's Complaint-Driven Broadcast Indecency Enforcement Process*, Progress on Point 12.22, Nov. 2005, www.pff.org/issues-pubs/pops/pop12.22indecencyenforcement.pdf.

possible outcome raises what the Supreme Court has referred to as the "heckler's veto" problem since a vocal minority's preferences could trump those of the public at large.[65]

Private, independent rating and labeling systems can offer the ability to shield their raters from interest group pressure, which could help ensure that their ratings are primarily influenced by the raters' own judgment rather than public pressure. This does not mean that such ratings are (or, necessarily, that they pretend to be) objective, or that they ignore public input entirely. Private rating and labeling systems may take account of criticisms. But if the government forced these systems to increase their openness to participation from the general public—as public policy might dictate if they were given some kind of official status—it could result in a circus-like atmosphere. More to the point, it could dilute the ability of raters to maintain fidelity to the particular criteria and values they claim to employ.[66] For example, if those assigning video game ratings were not anonymous, they might be harassed by both game developers (who want to make them more lax) and game critics (who want to make them more stringent).[67]

Similarly, there is no reason to believe the government could construct more rigorous parental controls or screening technologies. Consider Internet filters, for example. Starting with the passage of the Communications Decency Act of 1996, there have been endless political debates about the efficacy of private filters relative to government content controls. Policymakers typically argue that regulation is needed because filters are not 100% effective in blocking pornography or other types of objectionable online content.

No doubt this point is true, but what of it? During a recent trial about the merits of the Child Online Protection Act (COPA), the Department of Justice (DOJ) introduced evidence showing that major filters blocked sexually explicit content 87.4-98.6% of the time,[68] and the judge in the case concluded that filters generally block an average of 95% of sexually explicit material.[69] The DOJ seemed to suggest that this was not good enough, but would government regulation really produce a better track record than that? It's doubtful, especially because the

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[65] *Reno v. ACLU*, 521 U.S. 844, 880 (1997).

[66] As Competitive Enterprise Institute analysts Cord Blomquist and Eli Lehrer argue,

> A federally mandated video game rating system would require committee hearings, committee mark-up sessions, and floor debate. At the end of this process a new federal regulatory agency would exist, or an existing agency's powers would be expanded. Proposed changes in the system could require Congress to act, starting the legislative process anew. By contrast, the ESRB can respond swiftly to developments in the industry that require any adjustment in the ratings system.

Cord Blomquist & Eli Lehrer, *Politically Determined Entertainment Ratings and How to Avoid Them*, Competitive Enterprise Institute, at 22 (December 2007), http://cei.org/pdf/6292.pdf.

[67] Adam Thierer, The Progress & Freedom Foundation, *Can Government Improve Video Game Ratings?*, PFF Blog, October 26, 2006, http://blog.pff.org/archives/2006/10/can_government.html.

[68] For a breakdown of how successful various filters were, *see* www.aclu.org/freespeech/internet/27490res20061120.html.

[69] *American Civil Liberties Union v. Gonzales*, 478 F.Supp.2d 775, 795 (E.D.Pa. 2007), www.cdt.org/speech/copa/20070322copa.pdf.

government is largely powerless to control offshore activity. Private filters, by contrast, can filter or block objectionable offshore material. Private filters can also use industry standard identification systems to allow legitimate rated commercial content to be seen while screening out unknown or unrated content. And new methods are being developed and deployed to monitor and identify content, such as image-recognition technologies, which can further facilitate screening and filtering. For all these reasons, the better response is for government to promote empowerment tools and support user education.

E. The Goal Should Be 'Let-a-Thousand-Flowers-Bloom,' Not 'One-Size-Fits All'

Moreover, it is reasonable to assume that a market of commercial filters and other technological controls will flourish if governments promote industry experimentation rather than imposing a "one-size-fits-all" regulatory model. A marketplace of controls and filters can then develop that is more closely tailored to the diverse values of the citizenry. Government controls, by contrast, essentially treat all households as having the same needs and values, which we know is not the case. Even though not all private controls will be equally effective, failure will be detected more rapidly and the better systems will gradually win out as more and more legitimate content is tagged and rated.

F. Ad-Blocking Technologies & Other Media Empowerment Tools are Widely Available and Constitute a Less-Restrictive Approach to Expanded Regulation

Whatever the harms or benefits to children of seeing advertising, modern technological developments have empowered consumers—and especially parents—to take matters into their own hands if they want to altogether avoid exposure to (by themselves or their children) advertising or marketing efforts. For traditional video content, for example, VCRs, DVD players, digital video recorders, video on demand, and online video options are making it increasingly easy for anyone to skip ads with the push of a button on their remotes or just bypass them altogether.[70] Many media are available for viewing in forms that do not include advertisements at all, such as DVDs of television shows and movies delivered by mail or live streaming through Netflix, for example, which offers a staggering offering of children's programming, organized by age range and content type (including education & guidance).[71]

Similarly, technologies for blocking advertisements for online media platforms are readily available, most notably:

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[70] Adam Thierer, The Progress & Freedom Foundation, *Parental Control Perfection? The Impact of the DVR and VOD Boom on the Debate over TV Content Regulation*, Progress on Point 14.20, Oct. 2007, www.pff.org/issues-pubs/pops/pop14.20DVRboomcontentreg.pdf

[71] *See* http://www.netflix.com/Genre/Children_Family/302?lnkctr=mhhG302&lnkce=sntGrSn (children's DVD options) and http://www.netflix.com/WiGenre?sgid=318&pgid=302 (children's live-streaming options). It is worth noting, of course, that some DVDs include "unskippable" trailers that must be watched before the featured content begins. But for the most part, DVDs either offer commercial-free programming or commercials that are easily skipped, while live-streaming through Netflix is ad-free. By contrast, many other ad-supported Internet Video Programming Distributors, such as Hulu, also feature unskippable commercials.

- **AdBlock Plus:** Over 65 million people (roughly a half million every week) have downloaded the AdBlock Plus add-on for the Firefox web browser, which lets users entirely block many online ads (as well as cookies used to collect tracking data).[72] Similar add-ons are available for Google's Chrome browser (*e.g.*, AdThwart and AdBlock)[73] and Microsoft's Internet Explorer (*e.g.*, AdBlock IE, AdBlock Pro).[74]

- **Flashblock**: This Firefox plug-in blocks all Flash elements on a webpage until a user "opts-in" to loading them by clicking on them.[75] This tool can be used to prevent Flash display ads from loading on a page and thus reduce the amount of advertising seen by a child.[76]

Thanks to such technological developments , consumers are increasingly in a position to dictate exactly how much advertising they will tolerate in their lives. Government need not intervene to regulate the advertising marketplace on consumers' behalf when they have been empowered to do it for themselves or their children.[77] As the Supreme Court noted in a 2000 case involving content regulation, but which applies equally here, "Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us."[78]

V. There are Many Perils to Mandatory Controls, Restrictive Defaults and "Universal" Ratings

It appears from the language of the Child Safe Viewing Act[79] as well as the Commission's *CSVA Notice*[80] and *CSVA Report,* that some policymakers are interested in finding more "universal" solutions to parental control concerns.

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[72] *See* https://addons.mozilla.org/en-US/firefox/addon/1865. *See also* Adam Thierer & Berin Szoka, The Progress & Freedom Foundation, *Privacy Solution Series: Part 2—Adblock Plus*, PFF Blog, Sept. 8, 2008, http://blog.pff.org/archives/2009/11/privacy_solutions_part_8_the_best_anonymizer_avail.html

[73] *See* https://chrome.google.com/extensions/detail/cfhdojbkjhnklbpkdaibdccddilifddb https://chrome.google.com/extensions/detail/gighmmpiobklfepjocnamgkkbiglidom; *see generally* Berin Szoka, *Google & Openness: Allows Adblocking Extensions in Chrome*, Jan. 7, 2010, http://blog.pff.org/archives/2010/01/google_openness_allows_adblocking_extensions_in_ch.html.

[74] *See* http://adblockie.codeplex.com/ and www.adblockpro.com.

[75] https://addons.mozilla.org/en-US/firefox/addon/433

[76] https://addons.mozilla.org/en-US/firefox/addon/433

[77] "The state ought not do for us what we can just as well do for ourselves." Tom W. Bell, *Free Speech, Strict Scrutiny, and Self-Help: How Technology Upgrades Constitutional Jurisprudence*, 87 Minn. Law Rev. 774 (2003), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=422621.

[78] *Playboy*, *supra* note 34, 529 U.S. at 818.

[79] Section 2(a) of the Child Safe Viewing Act says the FCC shall examine "the existence and availability of advanced blocking technologies that are compatible with various communications devices or platforms" and Section 2(b) says the Commission shall consider blocking technologies that "may be appropriate across a wide variety of distribution platforms, including wired, wireless, and Internet platforms." *CSVA*, *supra* note 25.

Ultimately, however, the search for technological silver-bullet solutions and "universal" ratings or controls represents a quixotic, Holy Grail-like quest. Simply stated, if it sounds too good to be true, it probably is. There are no simple solutions or quick fixes to concerns about objectionable media content or online child safety. Only a "layered" approach—involving many tools, methods, and strategies—can get the job done right. And technological blocking controls are not the most important part of that mix. Education and mentoring are far more important.

Moreover, for the reasons stated below, any move to force "universal," top-down solutions could damage future innovation in this space. This section will discuss the unforeseen downsides to mandating controls and defaults as well as efforts to create universal rating or labeling schemes.

A. Mandatory Controls or Defaults Will Backfire

During ongoing debates about parental controls, ratings, and online child safety, there have occasionally been rumblings about the possibility of requiring that media, computing and communications devices: (1) be shipped to market with parental controls embedded, and possibly, (2) those controls being defaulted to their most restrictive position, forcing users to opt-out of the controls later if they wanted to consume media rated above a certain threshold. Presumably, this would require a law or regulation that would: (1) spell out what sort of controls or filters would be embedded in every "media or computing device" and then, (2) determine how restrictive the default control settings would be before the hardware or software in question was marketed.

If "default" requirements such as these were mandated by law, parents would be forced to opt-out of the restrictions by granting their children selective permission to media or online services. In theory, this might help limit underage access to objectionable media or online content. Such a mandate might be viewed as less intrusive than direct government censorship and, therefore, less likely to run afoul of the Constitution. For these reasons, such a proposal would likely have great appeal to some policymakers, family groups, child safety advocates, and parents. But mandating parental controls and restrictive defaults is a dangerous and elitist idea that must be rejected because it will have many negative unintended consequences without being likely to achieve the goal of better protecting our kids.

The first portion of the mandate is largely unnecessary, as almost all major media devices marketed today already contain some kind of parental controls: All TVs include V-chips, all set-top boxes include additional TV screening controls, and all video game consoles include blocking tools for both games and movies. With PCs, filters and monitoring tools have been made ubiquitously available by ISPs and non-profits for little or no charge, and newer operating systems such as Windows Vista include powerful parental control tools. Importantly, almost all of these tools are free-of-charge. A variety of supplementary tools can be purchased online or from electronics retailers or computer stores. As a general matter, moreover, it is rarely sound

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[80] Commenting on the language from Section 2(a) and 2(b) of the Child Safe Viewing Act, the Commission argues that, "This language makes it clear that we are to consider blocking technologies appropriate for use on a variety of devices that transmit audio and video programming." *CSVA Notice*, *supra* note 2, ¶ 7.

public policy to have governments—rather than market forces (*i.e.*, innovation and collective consumer choices)—select a particular technology or service as a mandatory feature. This risks locking in less-effective technologies and perhaps also creating financial windfalls for politically influential vendors of such technologies.

The real debate, then, comes down to the question of how effective those embedded controls are at meeting the interests of parents, and whether the embedded controls should have pre-established defaults set to the most restrictive setting available before they are shipped or downloaded. Of course, any company could *voluntarily* offer such an alternative today. It's worth asking, therefore, why are no companies currently doing so?

1. Many Parents Do Not Take Advantage of Parental Control Tools and Instead Rely On Non-Technical Alternatives

One of the enduring mysteries about parental controls is why many parents do *not* take advantage of the tools and options at their disposal. It's the proverbial "you can lead a horse to water, but you can't make it drink" problem. There are a few reasons why this may be the case.

As discussed in PFF's *Parental Controls* publication, many households may not take advantage of parental control tools because they instead rely on a variety of non-technical "household media rules."[81] Moreover, as discussed above, technical controls and rating systems are viewed as unnecessary in many homes where kids are below or above a certain age. Many parents of children under 4 or 5 years of age, for example, do not let their kids consume much media, or they at least exercise much tighter control over their children's media consumption habits. And after kids reach their mid-teen years, many parents eschew technical controls because they either trust their kids, or better yet, they constantly talk to them about media content and their online experiences.

Of course, it could also be the case that some parents do not use technical controls or rating systems because they find them too confusing. That may be true to some extent, but it is important to note that these controls and rating systems are becoming increasingly easy to use. Most parental control tools are just one or two clicks away on most TVs, gaming systems, or personal computers. And although there are different rating schemes for different forms of media, those rating systems share much in common and are all quite descriptive. Setting up parental controls is certainly no more difficult now than programming a personal video recorder or uploading digital photographs to the Internet.

Finally, it may be the case that some parents are simply not aware of the controls or ratings available to them. This too, however, is increasingly unlikely. Survey data suggests a growing familiarity with most rating systems (some more than others). Companies and non-profit organizations are increasingly offering more information and tutorials along with the parental control tools that are typically embedded, free-of-charge, in almost all modern media devices. In any event, the proper answer to concerns about insufficient parental awareness is not imposing restrictive mandatory defaults but increased educational efforts.

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[81] *PFF Parental Controls Report*, *supra* note 4 at 26-28.

Still, for whatever reason, many parents are not using parental controls or rating systems and, at the same time, many feel or express some concerns about being able to manage media use by their children. Regardless of the culprit—and it could be a combination of all of the factors listed above—what more could be done to encourage these parents to use existing technical controls and rating systems to limit children's access to potentially objectionable content or communications?

One way to increase parental comfort levels is through better education and awareness-building initiatives. Many companies already offer detailed information and tutorials along with the parental control tools they offer, but more could always be done to promote awareness of the tools and how to use them. Many parents may feel they cannot effectively manage media use in their homes because they are unaware of their options or unsure how to utilize the available tools.

One sensible first step is the inclusion of easy-to-understand instructions in all user manuals. "Tip sheets" could also be bundled along with the products, which provide a summary of how set up parental controls, or what relevant ratings meant. Most vendors already offer this and much more on their websites, but sometimes the links to those pages can be difficult to find. All media companies should consider placing clearly labeled links on their websites to guide visitors to parental controls, ratings information, or online safety tips. Finally, customer support hotlines—whether automated or staffed—could probably be improved and expanded.

Again, most companies are already moving in this direction today. It's simply a smart business practice since many parents increasingly expect such services to be available. To the extent some companies aren't keeping up, others—policymakers and child safety groups, in particular—are putting increasing pressure on them to provide such tools and assistance.

2. Enforcement Hassles Would Ensue

There are many reasons why no media or communications companies are currently offering such maximally restrictive defaults when they ship their products to market. Those reasons are instructive when considering the wisdom of requiring that such defaulted controls be mandated by law.

To begin, there's just not as much demand for technological controls as some might think. Again, not all homes have children in them. And, in those that do, not all those parents see the need to use parental controls or ratings, usually because they rely on household rules or tightly monitor or restrict access to media and communications devices.

Moreover, because there are many adults who purchase media devices for their own use, it would be illogical to ship *all* devices or products to market with the controls set to the most restrictive setting.[82] In fact, many consumers (even some who are parents themselves)

[82] This is true even for video game consoles. For example, according to a survey by Hart Research, the average age of a video game purchaser is 40. Entertainment Software Association, *Essential Facts about the Computer and Video Game Industry: 2006 Sales, Demographics and Usage Data*, at 3 2005, www.theesa.com/archives/files/Essential%20Facts%202006.pdf

would likely find it annoying, and perhaps even somewhat insulting, to be forced to opt-out of such controls when they purchase new media hardware or software—especially if they bear some part of the cost of such controls. And it's likely that as soon as such devices or services hit the market, consumer complaints would proliferate as irate users complained about what they considered to be defective hardware or software.

Could companies offer multiple versions of their hardware or software products to solve this problem? For example, some set-top boxes, gaming consoles, and PCs could be sold and labeled as "Kid-Friendly" (or "locked") while others are "Adult-Only" (or "unlocked"). It goes without saying that this would represent a major expense to many vendors (especially hardware vendors). It could also create potential confusion when the devices are labeled and marketed for sale. And what would the penalty be for a mislabeled device, or the accidental sale of such a device to a minor?

3. A V-Chip for Computers Would Be Extremely Difficult to Implement

The relatively widespread implementation of the V-chip as required by the Telecommunications Act of 1996[83] seems to have persuaded some that it would be a straightforward matter to create some kind of universal equivalent in computing devices and electronic media. But computers are quite unlike televisions. The V-chip implementation was successful, in part, because:

- Televisions are tangible consumer goods produced exclusively by for-profit companies. Relatively few companies manufacture TVs, and most TVs have substantially consistent basic functionality.
- The entire TV is brought to market by one firm, and end-purchasers generally have no relationship with other entities that made parts of the TV.
- The TV's functionality is simple and well-defined (even with greater integration of Internet capabilities), and is generally fixed at the time of manufacture and unchanged throughout the life of the product.
- TVs implement few protocols and standards; these were generally fixed before the TV was manufactured. And the Commission has jurisdiction of some sort over many of the entities involved in developing these standards.
- The V-chip functionality relates to the ability of a TV to display content from a comparatively small number of sources, almost all of them for-profit companies located in the United States.
- TV manufacturers, regardless of their views on particular government regulations, are rarely actively antagonistic toward ratings systems or parental controls.

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[83] *1996 Telecommunications Act*, *supra* note 10, § 551 (codified at 47 U.S.C. § 551).

The universe of computers and computer software is dramatically different from that of traditional television:

- Computers vary widely in their size and functionality, from bulky desktop devices to ultra-compact handheld devices.
- Computers are complex, containing hardware and software components developed by many different entities.
- These entities—particularly software developers—do not necessarily have any formal relationship and may not coordinate their activities with one another.
- Users can acquire new parts or software at any moment from a vast array of aftermarket participants. Many portions of the aftermarket are entirely unregulated and the Commission has little, if any, relevant jurisdiction in this area.
- Computer functionality changes over time—even as individual computers' capabilities are enhanced with new software—and computers may implement protocols and support for services and features that didn't even exist when the computers were initially manufactured. They regularly display content generated and/or distributed by a staggering variety of sources, foreign as well as domestic, including individual users as well as organizations, whether for-profit or non-profit.
- Some content producers and some computer software developers actively dislike or oppose rating mechanisms or blocking software and have no desire to cooperate with them.
- For content to trigger some sort of Internet V-Chip mechanism, it would all need to have metadata affixed according to a standardized scheme. The sheer volume of content that traverses the Internet—especially user-generated content—makes mandating universal metadata-labeling an impossible undertaking and raises special constitutional concerns.[84] And what body would draw up the metadata ratings and enforcement guidelines? What would be the penalty for stripping metadata or ratings from online content, which would undoubtedly occur?
- It is unclear where the Internet V-Chip filtering mechanism would reside within the Internet ecosystem. Would it be at the device level? Within the operating system? At the network level? Is the Commission capable of policing all those layers of the Net for compliance? Is it authorized to?

Because of these distinctions, it would be no easy task to create a V-chip for computers even if the Commission had the statutory authority to do so and could devise a way to do so within constitutional constraints. Although many different rating and blocking systems already exist for computer systems, none of them have or could be expected to have the sort of universality and ubiquity enjoyed by the V-chip.

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[84] *See supra* at 31.

4. Imposition of Mandatory Control Requirements Will Create Perverse Incentives

There is, however, already a market for some "kid-friendly" devices or services. For example, there are some wireless device and service options designed for kids that have limited features, and some toy (and toy-like) devices have filters on by default and/or only work with certain age-appropriate internet services. Many social networking services designed for kids have strict settings on by default. These may well be useful choices for some parents and kids. But whether that is the case seems to be best determined by the market.

Particularly for mass-market general use devices like PCs and televisions, mandating the offering of dual versions ("locked"/"kid-friendly" and "unlocked") seems likely to create perverse incentives, both for consumers and for media and technology providers. If services and devices are sold with the highest levels of restrictions active by default, many parents might seek to avoid the annoyance associated with the "kid-friendly" versions of the device and just purchase "unlocked" hardware or software. And kids would likely get quickly to work cracking the defaults on the kid-friendly versions of the hardware or software.[85] The result would be some significant degree of consumer dissatisfaction with restrictive-default services and, except perhaps in the case of households with very young children, dissatisfaction with locked/kid-friendly services and devices.

Among the possible consequences of such a dual version mandate would be a perverse incentive for service providers and device makers to avoid investing in parental control tools. If setting controls to the highest default level were mandatory, but at the same time most consumers don't prefer that default level, some consumer backlash would be inevitable. And when consumers are unhappy about a service feature—but companies are not permitted to address that unhappiness by turning off the higher settings—a likely result could be for companies to weaken or even not offer parental controls altogether.

There are other problems involved in enforcing such a mandate. Regulators would need to grapple with the possibility of widespread evasion in terms of offshore sales and black market devices. For example, would it be illegal for an eBay vendor located in Hong Kong to sell a U.S.-based customer an "unlocked" PlayStation Portable without first verifying that they are indeed an adult? If so, that's yet another layer of regulation that needs to be considered in terms of online age verification.[86]

The situation is even thornier when we consider software, which can be developed by individuals and hobbyists anywhere in the world. Regulations on software development, apart from slowing innovation and constraining the freedoms of software publishers, are particularly challenging to enforce.

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[85] Witness what happened in Australia within a few days of the government releasing subsidized filtering software. A 16-year old Melbourne schoolboy cracked the Australian government's $84 million Internet porn filter in just over 30 minutes. *See* Nick Higginbottom & Ben Packham, *Student Cracks Government's $84m Porn Filter*, News.com.au, August 26, 2007, www.news.com.au/story/0,23599,22304224-2,00.html

[86] Adam Thierer, The Progress & Freedom Foundation, *Social Networking and Age Verification: Many Hard Questions; No Easy Solutions*, Progress on Point No. 14.5, March 21, 2007, www.pff.org/issues-pubs/pops/pop14.5ageverification.pdf.

Of course, governments could attempt to forbid the development of "unlocked" devices or software and mandate that *every* media or computing device sent to market had defaults set to maximum restrictiveness. Even assuming such rules would not run afoul of either the First Amendment or international trade law, many of the same problems would still develop. It would likely be difficult to stem the flow of illegal devices or software, and hackers would likely only work harder to defeat existing controls. And what about all the existing "unlocked" devices already on the market? This mandate might breathe new life into older devices and discourage some consumers from making the jump to new hardware and software that includes superior parental control tools.

A final enforcement question relates to how broadly "media devices" are defined for purposes of this mandate. TVs, set-top boxes, gaming consoles and PCs would all be covered, of course. But what about mobile phones, iPods, MP3 players, PlayStation Portables and GameBoys, and so on? If "media devices" is defined broadly enough, it would bring an unprecedented array of consumer electronic devices and communications technologies under the purview of the FCC. Each class of devices would likely have its own set of enterprising hackers and renegade device makers, eager to evade the mandates. Presumably, financial penalties would be required and various enforcement actions would be sanctioned in an attempt to thwart such activity. Finally, as a result of these new mandates, the prices of all the affected media devices would likely rise for consumers.

5. Unintended Consequences & Constitutional Concerns Will Accompany Such Regulation

A proponent of mandatory defaults might object that regulation is often difficult, even expensive, but we still find ways to enforce many other laws—if only to try to teach the public, or kids, a lesson. In this case, some slippage in the system might be viewed as an acceptable trade-off for increased awareness among some parents about parental control tools or potentially objectionable media content or forms of online communications.

But this mentality myopically ignores the many unintended consequences of such a regulatory regime. Such a mandate, however well-intentioned, *threatens to upset the current balance of things and could leave parents and their children less well off*.

As explained above, there has never been a time in our nation's history when parents have had more tools and methods at their disposal for controlling their children's media consumption. Indeed, on the whole, parents are gaining control, not losing it, with technological innovation. This trend towards greater empowerment would be slowed, or even reversed, by misguided public policy prescriptions. Worse, mandatory defaults could lull some parents into a false sense of security if they came to believe that, because a filter was installed, they need do nothing more to help their children go online safely, or to remain engaged in their children's media consumption.

Moreover, as noted above, a rule mandating restrictive parental control defaults might create perverse incentives for industry to *not* rate content or build better controls at all. After all, it is important to remember that the ratings and controls that government is seeking to regulate here are *voluntary and private*; there is no reason they couldn't be abandoned tomorrow. Of course, if they were abandoned that might lead to calls for government

intervention or regulation and the substitution of some sort of universal ratings regime for the voluntary systems that exist today. If that occurred, lawmakers would be likely pressured into either making content-based determinations or mandating that a private organization do the same thing; either response would likely run afoul of the First Amendment.

But even if voluntary rating systems remained in place as the basis of a new federal enforcement regime, there *are* some constitutional issues in play here. Namely, it would be unconstitutional for government to enshrine a private ratings scheme into law or use it as a trigger for legal liability. That's what several courts have held in past years after some state and local governments attempted to enact laws or ordinances based upon the MPAA's voluntary movie ratings system.

For example, in *Borger v. Bisciglia* a U.S. District Court held that "[A] private organization's ratings system cannot be used to determine whether a movie receives constitutional protection."[87] Similarly, in *Swope v. Lubbers*, the court held that "[t]he standards by which the movie industry rates its films do not correspond to the … criteria for determining whether an item merits constitutional protection or not."[88] Roughly a dozen court cases have come to largely the same conclusion: Government cannot co-opt a voluntary, private ratings system for its own ends.[89] Recent video game cases have reached similar conclusions.[90] Thus, a law mandating parental control defaults based on voluntary ratings systems will likely end up in court and become the subject of another protracted legal battle between government and industry.

6. Mandatory Defaults Are Not Necessary

Finally, it's worth noting that most media, communications, and computing devices cost substantial sums of money. Televisions, movies, video games, cell phones, MP3 players, computers, and so on don't just drop from high-tech heaven into our kids' laps! When our kids want those things—or want things that are advertised on those media platforms—they generally must come to parents and ask for money (usually a lot of it). This is especially true for younger children. This "power of the purse" is, in many ways, the ultimate parental control tool. If parents are shelling out money for such devices, they are presumably also in a good position to set some rules about the use of those devices once they are brought into the home. Whether those rules take the form of informal household media rules or technical parental controls is, ultimately, a decision that each family must make for themselves. There is no reason for government to make that decision preemptively for *all* households by mandating highly restrictive parental control defaults.

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87 *Borger v. Bisciglia*, 888 F. Supp. 97, 100 (E.D. Wis. 1995).

88 *Swope v. Lubbers*, 560 F. Supp. 1328, 1334 (W.D. Mich. 1983).

89 *Interstate Circuit v. Dallas*, 390 U.S. 676 (1968); *Drive in Theaters v. Huskey*, 305 F. Supp. 1232 (W.D.N.C. 1969); *Engdahl v. City of Kenosha*, 317 F. Supp. 1133 (E.D. Wis. 1970*); Motion Picture Association of America v. Specter*, 315 F. Supp. 824 (E.D. Pa. 1970); *State v. Watkins*, 191 S.E. 2d 135 (S.C. 1972); *Watkins v. South Carolina*, 413 U.S. 905 (1973); *Potter v. State*, 509 P.2d 933, (Okla. Ct. Crim. App. 1973); *Neiderhiser v. Borough of Berwick*, 840 F.2d 213 (3d Cir. 1988); *Gascoe, Ltd. v. Newtown Township*, 699 F. Supp. 1092 (E.D. Pa. 1988).

90 *See supra* note 33.

Moreover, there are better ways for government and industry to encourage the diffusion and adoption of parental control tools and rating systems. Instead of spending money litigating cases against the government, industry should plow their resources into improved, easier-to-use parental control tools and consumer education efforts. And government education and awareness-building campaigns could go a long way toward improving consumer adoption. In the past, government has helped change public attitudes about safety in other contexts by undertaking (or lending support to) various public awareness campaigns, including: forest fire prevention efforts ("Smokey the Bear" campaigns);[91] anti-littering efforts ("Give a Hoot, Don't Pollute" campaigns);[92] and seat-belt safety (the crash test dummy campaigns).[93] Those campaigns have helped forever change behavior and improved public safety as a result.

Policymakers should tap these more constructive, constitutional solutions and steer clear of mandating parental controls and restrictive default settings that would, ultimately, have many unintended consequences and leave parents and children worse off in the long run.

B. Mandating Universal Ratings Would Be a Mistake

So-called "universal ratings" schemes would suffer from many of the same problems that would plague mandatory parental controls or defaults.

1. We Already Have Widespread Sectoral Ratings

It is important to first acknowledge the fact that while we do not have a "universal rating" system across all media—television, movies, music, video games, and the Internet—several current voluntary rating systems *are* universal, or nearly universal, within their respective sectors.

The same cannot be said of current "independent" ratings schemes. Although those systems provide parents with beneficial information, they fall well short of being as comprehensive as official industry-based rating systems. For example, Common Sense Media provides the public with a wonderful informational resource that freely offers detailed reviews of new movies, television programs, video games, music, and more.[94] Still, Common Sense Media does not come anywhere close to rating all the media content emanating from those sectors. More obscure titles typically go unrated by the organization, and older content that pre-dates the organization remains largely unrated. Moreover, there is no guarantee that independent rating sites will exist forever. Indeed, many independent media review sites and services have come and gone over the past decade.

Finally, official industry rating systems establish a sort of baseline for all other rating systems. Not only does the public—and parents in particular—use the official rating systems as a rough proxy for whether or not content is acceptable for their kids, but independent rating services also use the official industry ratings as point of comparison. This represents a healthy

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91 http://www.adcouncil.org/default.aspx?id=129

92 *See* http://www.adcouncil.org/default.aspx?id=132 and http://en.wikipedia.org/wiki/Woodsy_Owl

93 http://www.adcouncil.org/default.aspx?id=138

94 www.commonsensemedia.org

form of competition among official rating systems and independent systems, with the independent groups providing a useful "watchdog" role in this regard. The public is better off for having access to *both* industry and independent rating schemes.

2. Mandating Universal Ratings Would Destroy Innovation and Impose Serious Costs on Media Providers and Consumer Electronics Companies

Mandating "universal" controls and ratings across all media platforms could destroy innovation in this space by substituting a government-approved, "one-size-fits-all" standard for today's "let-a-thousand-flowers-bloom" approach, which offers diverse tools for a diverse citizenry.

At a minimum, a universal ratings mandate would erase years' worth of educational efforts by industry and others to inform the public about existing rating systems. Crafting a new ratings scheme for all media would require a massive public re-education effort that would create confusion in the interim with no guarantee of success in the long run.

A universal rating mandate or mandatory technological "silver-bullet" solution would also impose significant costs on media providers and consumer electronics (CE) companies. Complying with such a mandate would force media creators to re-train the employees who label new content, re-label their back catalogs of content, and re-educate their consumers about the new system. For manufacturers of CE and digital media devices, the costs associated with a universal ratings mandate would also be steep. Each new device capable of receiving media content that was required to be rated and filterable would have to have to be equipped with new filtering technology. Moreover, all legacy content and devices would become a casualty of regulation: Because it is unlikely they could be made compatible, they would suddenly become obsolete-by-regulation—at a significant economic loss to manufacturers and vendors who would be pressured to dispose of their inventory.

3. "Scientific Ratings" Are a Fiction

As noted above, media rating and content-labeling efforts are not an exact science but a fundamentally subjective exercise. While some academics have suggested that ratings can be made more "scientific," the reality is that rating and labeling artistic expression will always be highly contentious. Attempting to give a rating system the aura of "science" implies that the process would be more authoritative or trustworthy, but there is no evidence to show why that would be the case. For instance, courts have frequently rejected scientific evidence presented in "violent videogame" cases because most of the studies purporting to establish a causal link between minors playing such games and actual psychological damage contain significant methodological flaws.[95]

Practically speaking, the problem with this approach is that it raises the prospect of gridlock and delay in getting content rated and made available to consumers on a timely basis. If every movie, television program, album, video game, and so on, were required to be rated by some sort of "blue-ribbon" task force made up of academic experts, media "experts," child

[95] *See, e.g., Schwarzenegger*, 556 F.3d at 963-965.

psychologists, and so on, how long would it take to get their approval? Would the panel have the right to prohibit some media content from being released altogether? Would they have the power to fine retailers for non-compliance with the new system?

Of course, there is nothing stopping anyone from voluntarily bringing together a group of independent experts to create alternative guidelines or independent rating systems. But having such systems enshrined by law raises many thorny Constitutional and practical questions.

4. Mandatory Universal Ratings Would Raise Profound First Amendment Concerns

The notion that the government should have a say in how speech and artistic expression is rated and labeled raises serious First Amendment issues. As noted above, many courts have held that it would be unconstitutional for government to enshrine any private ratings scheme into law or use such a scheme as a trigger for legal liability. A mandatory universal rating scheme would raise even more profound First Amendment concerns since it tiptoes dangerously close to the definition of prior restraint and/or compelled speech.

Presumably, if government required all content to be labeled according to some "universal" standard or scheme, it would require that the government have some say in creating, or at least blessing, that standard and then stipulating penalties for non-compliance with that rating scheme. This is where a subtle—if not explicit—form of prior restraint would enter the picture.

As the Supreme Court stated in *Bantam Books Inc. v. Sullivan* (1963), "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[96] In that case, the Court struck down as unconstitutional a Rhode Island measure which had created a Commission "to educate the public concerning any book … or other thing containing obscene, indecent or impure language, or manifestly tending to the corruption of the youth as defined [in other sections] and to investigate and recommend the prosecution of all violations of said sections."[97] The Court found that the Rhode Island Commission to Encourage Morality in Youth had engaged in "informal censorship" when it:

> notif[ied] a distributor that certain books or magazines distributed by him had been reviewed by the Commission and had been declared by a majority of its members to be objectionable for sale, distribution or display to youths under 18 years of age.[98]

Such notices requested the distributor's "cooperation" and advised him that copies of the lists of "objectionable" publications were circulated to local police departments and that it was the Commission's duty to recommend prosecution of purveyors of obscenity.[99] Even though no

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96 *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

97 *Id*. at 83.

98 *Id.* at 61.

99 *Id*. at 62-63.

"books [had] been seized or banned by the State, and … no one has been prosecuted for their possession or sale," the Court recognized these "informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" as a system of "informal censorship."[100]

Similarly, in *Interstate Circuit v. Dallas* (1968), the Supreme Court struck down as unconstitutionally vague an ordinance authorizing the classification of certain films as "not suitable for young persons," where the standard was defined as "describing or portraying brutality, criminal violence or depravity in such a manner as to … incite or encourage crime or delinquency on the part of young persons."[101] In *Interstate Circuit*, the Court also noted that "there has been no retreat in this area from rigorous insistence upon procedural safeguards and judicial superintendence of the censor's action" and cited a long string of cases in support of that notion.[102] Since that time, the Supreme Court and lower courts have continued to strike down all prior restraint laws and state and local ordinances dealing with content labeling requirements.

More recently, in a series of video game-related cases, Federal appellate and district courts have consistently struck all state and local efforts aimed at imposing labels on video games or co-opting the video game industry's rating system and giving it the force of law.[103] In two of the most recent of these cases, appellate courts struck down similar state laws banning the sale of certain video games to minors and mandating that retailers place a label with the numerals "18" on such games.[104]

The two circuit courts agreed that the labeling mandates constituted compelled speech—namely, the state's conclusion that a particular video game was inappropriate for minors because it qualified as "sexually explicit" (Illinois) or "violent" (California). Both courts agreed that the government could compel only the disclosure of "purely factual and uncontroversial information" for the sake of consumer protection, such as product warning labels about mercury content or, in an attorney's advertisement, the fact that clients might be responsible for costs of litigation.[105] By contrast, the Seventh Circuit concluded that Illinois's label "communicates a subjective and highly controversial message—that the game's content is sexually explicit," a message that the court declared "non-factual," "far more opinion-based than the question of whether a particular chemical is within any given product," and "unlike a

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100 *Id*. at 67.

101 *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968).

102 *Id.* at 682-3. The other decisions cited by the court were: *Freedman v. Maryland*, 380 U.S. 51 (1965); *Winters v. New York*, 333 U.S. 507 (1948); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Gelling v. Texas*, 343 U.S. 960 (1952); *Superior Films, Inc. v. Department of Education*, 346 U.S. 587 (1954); *Commercial Pictures Corp. v. Regents*, 346 U.S. 587 (1954); *Holmby Productions, Inc. v. Vaughn*, 350 U.S. 870 (1955).

103 *See supra* note 33.

104 *Schwarzenegger*, *supra* note 30, 556 F.3d 950; *Blagojevich*, 469 F.3d 641.

105 *See Blagojevich*, 469 F.3d at 651-52 (citing *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114-16 (2d Cir. 2001); *Zauderer v. Office of Disciplinary Counsel for Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985)); *see Schwarzenegger*, 556 F.3d at 966-67.

surgeon general's warning of the carcinogenic properties of cigarettes."[106] The Ninth Circuit reached the same conclusion and, while declining to adopt the Seventh Circuit's application of the exacting standard of strict scrutiny, concluded that California's labeling mandate could not survive even the less demanding standard of intermediate scrutiny, also noting that the mandate did not serve to protect consumers against deception.[107]

These two cases, and the Supreme Court cases on which they rest, make it clear that any universal ratings system aimed at determining what is "safe" or "harmful" to minors – a determination that is far from "purely factual and uncontroversial information"[108] – would almost certainly be struck down by the courts. In particular, when it comes to labeling content according to its likelihood to harm, or benefit minors, any suggestion that the determination would be "uncontroversial" would not survive scrutiny.

Furthermore, the Supreme Court's recent decision in *Citizens United* demonstrates that speech-regulatory schemes can, simply by virtue of their complexity, run afoul of the First Amendment: "Prolix laws chill speech for the same reason that vague laws chill speech: 'People of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'"[109] As the Supreme Court explained:

> This regulatory scheme may not be a prior restraint on speech in the strict sense of that term, for prospective speakers are not compelled by law to seek an advisory opinion from the FEC before the speech takes place. As a practical matter, however, given the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak. These onerous restrictions thus function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th– and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit.

Content-labeling or content-rating schemes proposed in connection with this NOI will likely suffer the same constitutional defects, simply because rating or labeling content is inherently subjective. The First Amendment simply does not permit the government to subject speech to "the open-ended rough-and-tumble of factors."[110] Just as the "First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct

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[106] *Blagojevich*, 469 F.3d at 652.

[107] *Schwarzenegger*, 556 F.3d at 967 (citing *Zauderer*, 471 U.S. at 651 (requiring that the "disclosure requirements [be] reasonably related to the State's interest in preventing deception of customers").

[108] *Cf. supra* note 105.

[109] *Citizens United v. Federal Election Commission*, No. 08–205. slip op. (Jan. 21, 2010), *available at* www.scotusblog.com/wp-content/uploads/2010/01/citizens-opinion.pdf (quoting *Connally* v. *General Constr. Co.*, 269 U. S. 385, 391 (1926)).

[110] *Id.* at 19 (criticizing Federal Election Commission's "two-part, 11-factor balancing test" to determine "whether a communication was the functional equivalent of express advocacy.").

demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day,"[111] the First Amendment would not permit laws that forced all online speakers, from individuals to small content producers, to consult lawyers or First Amendment experts in determining how to rate or label their expression.

For all these reasons, crafting a universal content rating system within these constitutional constraints would be highly challenging and, even if it could be done, the result would be highly unlikely to satisfy those who advocate labeling mandates.[112]

5. Broad-based—and Non-Governmental—Ratings May Evolve Naturally from Increased Metadata Tagging and Crowdsourcing Efforts

The growth of user-generated content and interactive social networking sites and services raises profound challenges for traditional rating systems and government regulation alike. The sheer volume of speech and expression being produced in modern times simply dwarfs all the content created over the past century.

Importantly, however, these new means of communications and content creation are also spawning innovative approaches to content labeling through metadata "tagging" as well as content "flagging," which refers to user efforts to highlight inappropriate or objectionable content or comments.

Consider the "reputational systems" and user-generated reviews already in place on some major websites. An increasingly important part of the content offered by sites such as Amazon.com, Netflix.com, Metacritic.com, and IMDB.com (the Internet Movie Database) is the detailed reviews posted by users of movies, TV programs, and other types of media content. These reviews can help parents screen content for their children. Better yet, some of those sites allow users to find other users with similar tastes and values and track their reviews regularly. Thus, once a parent finds a particular piece of content they deem suitable for their children, these sites make it easy for that parent to find other content that is likely to match their values—thus "crowdsourcing" to other users the inherently subjective task of rating content and allowing parents to follow reviews from users who seem to share their values.

On sites with a great deal of user-generated content, such as YouTube.com and many social networking sites, users can "flag" inappropriate content through various reporting mechanisms. Once enough users in that online community have flagged a certain post or piece of content as inappropriate, the "wisdom of the crowd" will help site administrators identify

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[111] *Id.* at 7.

[112] Of course, to be truly "universal," a content ratings system would have to apply not only to "professional" content (like existing industry ratings systems), but also to user generated content. But the prior restraint of requiring users to label (or have others label) their content would significantly impair speech and content generation by users who wish to remain anonymous. Noting an honorable tradition of advocacy and of dissent in America and recognizing anonymity as "a shield from the tyranny of the majority," the Supreme Court has rejected laws that burden anonymous speech, such as prohibitions on anonymous pamphleteering and online age verification mandates for sexually explicit content. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995). Thus, the hope of a "universal" ratings system appears to be ultimately inconsistent with the First Amendment.

which content (or users) the online community feels are problematic. Offending content can then be (and frequently is) removed and users who cause problems can be dealt with, or even removed from the site.

Finally, the increased use of digital metadata tagging can facilitate greater user screening. Metadata, which is essentially data about data, can be embedded in almost any digital media file. It can be used either by the content creator or downstream parties to embed useful information about content ratings, descriptors, warnings, *etc.* As more and more content gets "tagged and flagged"—by both creators and crowds—it will facilitate easier information retrieval and blocking.

VI. We Are Living in the Golden Age of Children's Video Programming Options and Opportunities

A. Viewing Choices for Children Continue to Expand Rapidly

The Commission's *Notice* asks "Is there enough educational content for children available on electronic media today?"[113] While it is impossible to gauge what "enough" means in this context, the good news is that the overall market for family and children's programming options continues to expand quite rapidly. Thirty years ago, families had a limited number of children's video programming options at their disposal on broadcast TV. Today, by contrast, there exists a broad and growing diversity of children's television options from which families can choose. The list below highlights just some of the more popular family- or child-oriented networks available on broadcast, cable, telco, and satellite television today. We have updated this list for this filing as the range of options continues to grow rapidly.

Kids/Family TV Channels:

- ABC Family Channel (http://abcfamily.go.com)
- Animal Planet (http://animal.discovery.com)
- Anime Network (www.theanimenetwork.com)
- Boomerang (www.cartoonnetwork.com/tv_shows/boomerang)
- Cartoon Network (www.cartoonnetwork.com)
- Discovery Channel (www.discovery.com)
- Discovery Kids (http://kids.discovery.com)
- Disney Channel (www.disney.go.com/disneychannel)
- Disney XD (http://disney.go.com/disneyxd)
- Encore WAM! (www.starz.com/channels/encore/encorewam)
- Familyland Television Network (www.familyland.org/content/Content.aspx?CategoryID=51)
- FUNimation (www.funimation.com)
- Hallmark Channel (www.hallmarkchannel.com)
- Hallmark Movie Channel (www.hallmarkmoviechannel.com)
- HBO Family (www.hbofamily.com)

[113] *Empowering Parents Notice*, *supra* note 1 ¶ 25.

- History Channel (www.history.com)
- Inspiration Network (www.insp.com)
- KTV – Kids & Teens Television (www.ktvzone.com)
- Learning Channel (http://tlc.discovery.com)
- National Geographic Channel (http://channel.nationalgeographic.com/channel)
- Nickelodeon & Nick 2 (www.nick.com)
- Nick Toons (http://nicktoonsnetwork.nick.com/home.html)
- Nick Jr. (www.nickjr.com)
- PBS (www.pbs.org)
- PBS Kids (http://pbskids.org/go)
- Science Channel (http://science.discovery.com)
- Showtime Family Zone
- Sprout (www.sproutonline.com)
- Starz! Kids and Family (www.starz.com/channels/starz/starzkidsandfamily)
- Teen Nick (www.teennick.com)
- Varsity World (www.varsityworld.com)

Top Children's Interactive Software:[114]

- Alice in Vivaldi's Four Seasons
- Community Construction Kit
- DreamBox Learning (www.teennick.com)
- Hoyle Kids Games
- I Spy (http://www.scholastic.com/ispy)
- Kid Pix
- Leap Frog (www.leapfrog.com)
- Mia's Adventures
- Scholastic Keys

Top Children's Interactive DVDs:

- Baby Einstein
- Barney (http://www.barney.com/usa/index.asp)
- Beethoven Lives Upstairs
- Brainy Baby (www.starz.com/channels/starz/starzkidsandfamily)
- Mister Rogers' Neighborhood
- Raffi: Singable Songs Collection
- Richard Scarry Collection
- Schoolhouse Rock
- Sesame Street

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[114] *See* following website for "Educators Preferred Educational Software Games": www.childrenssoftwareonline.com/

- Veggie Tales (https://bigidea.com/index_cmas.aspx)
- The Wiggles (http://www.thewiggles.com.au/)

Child-Oriented Web Search Engines & Portals

- Ask Jeeves For Kids (www.ajkids.com)
- CleanSearch.com
- Cantufind.com
- Intellibuzz.com
- KidsClick.org
- Kids Wed (http://www.mcpl.lib.mo.us/KidsWeb/)
- Looksmart Kids Directory (http://search.netnanny.com/?pi=nnh3&ch=kids)
- Super Kids (http://www.super-kids.com/)
- Yahooligans (www.yahooligans.com)

Importantly, this list does not include the complete (and rapidly growing) universe of television networks or other media services that are not targeted directly at children but might be relevant to children, such as religious/spiritual or nature-oriented programming. Nor does it include the many family or educational programs that traditional TV broadcasters offer on the air or via alternative media.

The Commission asks, "Do sufficient marketplace incentives exist to create educational content for children, or is governmental or industry action needed to increase incentives?"[115] Only a small percentage of the content mentioned above was produced under CTA mandates. The vast majority of this content was produced in response to marketplace demand. More offerings are always welcome, of course. But many parents struggle to sort through all the wonderful video programming options already at their disposal. Families often find themselves swimming through an ocean of choices available from local broadcasters and multichannel video providers.

Moreover, kids are spending an increasing amount of time watching snippets of video via kid-oriented online search portals like KidZui[116] and Glubble.[117] Such online walled gardens offer a safe place for parents to find an amazing array of appropriate online content for their kids since those services pre-screen everything available on their portals. Finally, a new online service called Clicker.com, which essentially acts as a "TV Guide for the Internet," makes it easy to search for and retrieve a massive amount of online content by searching through its "Kids" category.[118]

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[115] *Empowering Parents Notice, supra* note 1, ¶ 25.

[116] www.kidzui.com

[117] www.glubble.com

[118] www.clicker.com/category/kids

B. Empowerment Device Offerings Continue to Expand

One of the most important developments on the parental controls front in recent years has been the rapid spread of VCRs, DVD players, digital video recorders (DVRs), and video on demand (VOD) services. These technologies give parents the ability to accumulate libraries of preferred programming for their children and determine exactly when it will be viewed. Using these tools, parents can tailor programming to their specific needs and values.[119] Needless to say, such content tailoring was not an option for families in the past. The flowering of these tools represents a real world example of what the Supreme Court had in mind when it held, in its landmark 2000 *Playboy* decision, "[t]echnology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us."[120]

The following tools and technologies are helping to empower families to take more control over their video choices:

a. VCRs & DVD players / recorders

Many households continue to use videotapes and DVDs to build libraries of preferred programming. Parents can either purchase original copies of programs on VHS or DVD, or they can record shows when they appear on television on VHS tapes or recordable DVDs. The Consumer Electronics Association (CEA) estimates that 85% of U.S. households have at least one VCR. That is down from a high of 91% in 2005. The number of VCRs in homes is declining steadily because consumers have been replacing them with DVD players and DVD recorders. According to CEA, 83% of households have at least one DVD player, up from 13% in 2000. (Exhibit 1 documents the growth of VCR and DVD household penetration.)

Of course, as Larry Magid of CBS News.com points out, "VCRs are a hassle. You have to remember to program them, make sure you have a blank tape inserted, label and keep track of the recorded tapes, and insert them for the kids when they're ready to watch."[121] Much the same is true of DVD recorders. That is why the rise of the next-generation digital media devices described below is so important. Those devices help parents simplify and automate the content tailoring process in their homes.

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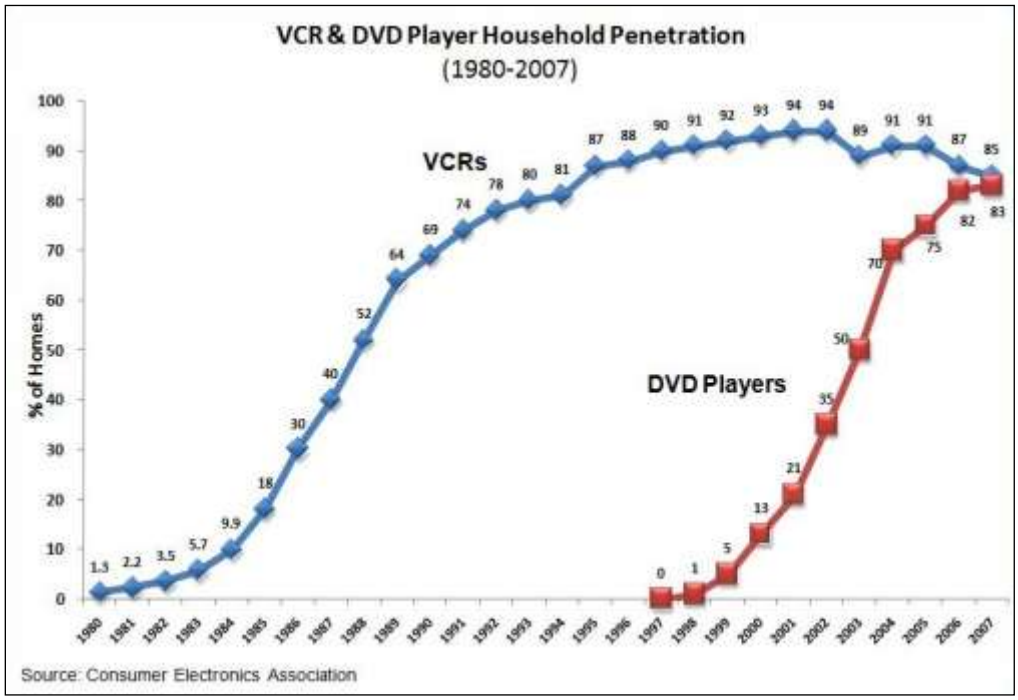
[119] "[PVRs] are quickly revolutionizing the way families watch television, with easy-to-use-systems and a convenience that every family can appreciate." Sharon Miller Cindrich, *e-Parenting: Keeping Up with Your Tech-Savvy Kids* at 172 (2007).

[120] 529 U.S. at 818, *supra* note 34.

[121] Larry Magid, *TV Tips for Parents*, CBS News.com, Aug. 2, 2002, www.cbsnews.com/stories/2002/08/07/scitech/pcanswer/main517819.shtml

Exhibit 1: VCR & DVD Player Usage



b. Digital video recorders (DVRs) / Personal video recorders (PVRs)

Considering the significant amount of buzz we hear about them today, it's easy to forget that digital video recorders (sometimes referred to as personal video recorders) are not even a decade old yet. But when TiVo and ReplayTV hit the market in 1999, it helped usher in what many regard as a revolution in television.[122] Those devices gave consumers an unprecedented level of control over their viewing experiences by allowing them to instantly pause, rewind, and fast-forward programming. DVRs also let consumers watch television on their terms by building an archive of desired programming. Today, all DVRs—including those sold or leased by cable, telco, and satellite operators—offer these features. Those tools and functions are particularly helpful to parents. "[DVRs] are quickly revolutionizing the way families watch television, with easy-to-use-systems and a convenience that every family can appreciate," argues Sharon Miller Cindrich, author of *e-Parenting: Keeping Up with Your Tech-Savvy Kids*.[123]

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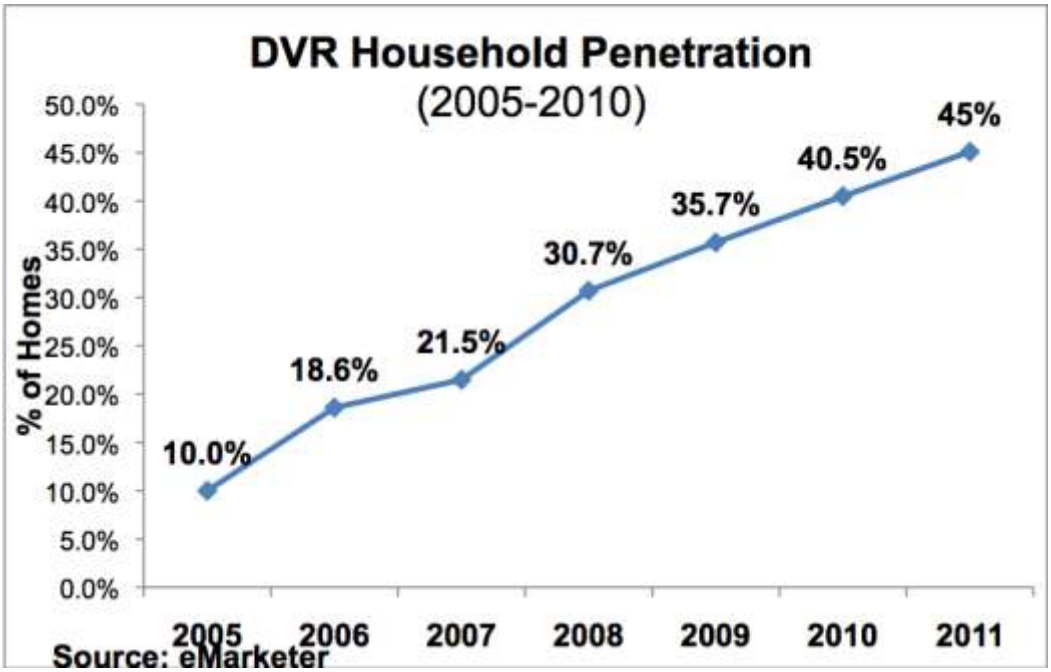
[122] Glenn Derene, *The End of TV As We Know It*, Popular Mechanics, June 14, 2007, www.popularmechanics.com/blogs/technology_news/4217964.html

[123] Sharon Miller Cindrich, *e-Parenting: Keeping Up with Your Tech-Savvy Kids* at 172 (New York: Random House Reference, 2007).

Exhibit 2: Projected Growth of DVRs



The DVR revolution is certain to continue and spread. Consider these facts and recent marketplace developments:

- "Consumers are beginning to embrace digital video recorders (DVRs) as they once did VCRs," notes John P. Mello of the *E-Commerce Times*.[124] Indeed, according to the Leichtman Research Group, a market research firm, more than one in every five U.S. households now have a digital video recorder, up from about one in every 13 households just two years ago.[125] Leichtman Research also predicts that roughly 50% of all homes will have a DVR by 2011.[126]
- Another market research firm, eMarketer, reports similar numbers, projecting that household penetration of DVRs will approach 45% of all homes by 2011.[127] (Exhibit 4 documents the projected growth of DVRs through 2011 according to eMarketer).
- DVR unit sales continue to grow at a rapid pace. The CEA reports that DVR unit sales roughly doubled between 2006 (4.9 million units) and 2007 (8.9 million), and are projected to almost double again (16.7 million).

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[124] John P. Mello, *DVR Market Penetration: Riding a Provider-Powered Wave*, E-Commerce Times, Sept, 26, 2007, www.ecommercetimes.com/story/trends/59497.html

[125] *DVRs Now In Over One of Every Five U.S. Households*, Leichtman Research Group, Aug. 21, 2007, www.leichtmanresearch.com/press/082107release.html

[126] *Supra* note 124.

[127] *Growing DVR Ownership Good for TV Ads*, eMarketer, Aug. 20, 2007, www.emarketer.com/Article.aspx?id=1005279; *30 Percent of Homes to Have DVR Capability*, eMarketer, Nov. 28, 2006, www.emarketer.com/Article.aspx?id=1004316

- DVR prices continue to fall steadily. The CEA reports that the average unit price for a DVR fell from $261 in 2003 to $177 in 2007, and it is projected to fall to $160 by 2008. (Exhibit 3 charts the growth of unit sales versus declining unit prices for DVRs).

Exhibit 3: DVR Sales & Prices

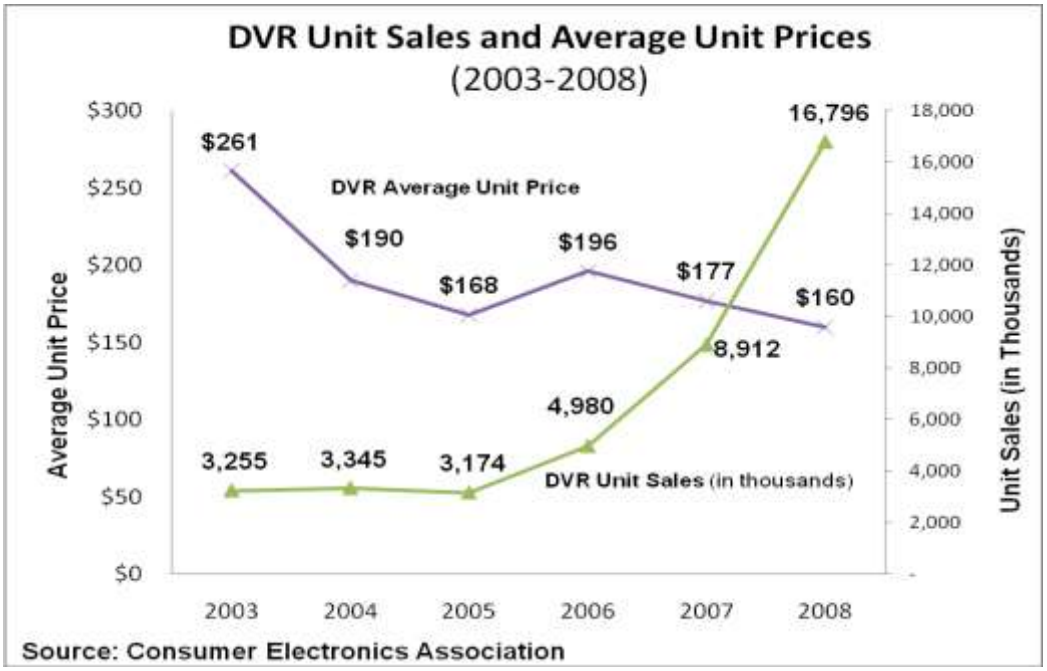
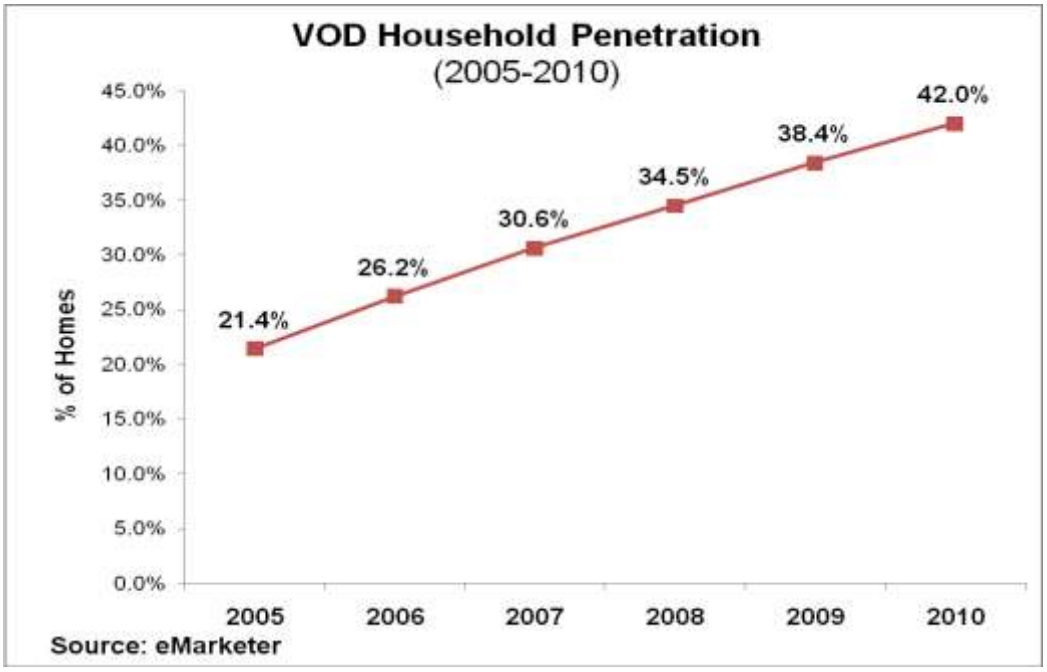


Exhibit 4: Projected Growth of VOD



c. Video on demand (VOD) services

Video on demand services are also becoming more widely available to consumers, and many family-friendly options are available via VOD:

- eMarketer estimates that VOD household usage will grow from 21.4% in 2005 to 42% in 2010. (Exhibit 5 documents the projected growth of VOD).
- According to SNL Kagan, "nearly 90 percent of U.S. digital cable subscribers had access to VOD, and 46 percent of all basic cable customers were offered the service at the end of March [2007]."[128]
- Pike & Fischer estimates that each home will be watching nearly two hours of on-demand content nightly by the end of 2012.[129]
- Children's programming represents a large and quite popular portion of the overall universe of VOD programming.[130] VOD offerings from Nickelodeon, the Cartoon Network, and PBS's Sprout have been wildly successful and show that "kids' TV rules on VOD" according to Stump.[131] Last year, Comcast Corporation, the nation's largest cable provider, also found that children's programming was one of the most popular VOD categories.[132]
- A Comcast poll of its most aggressive VOD and DVR users last year found that 85% of those customers indicate they "always have appropriate shows available for their children to watch." Moreover, 65% of them said that they "have fewer conflicts about what to watch on TV" and 63% said that they "watch more television as a family" thanks to these tools.[133]
- A 2005 study by Marquest Research revealed approximately 29% of VOD homes with kids reported watching VOD programming three or more times per week, compared with only 12% in VOD homes without kids.[134]

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128 *VOD Availability Grows with Digital Platform*, VOD & ITV Investor, SNL Kagan, No. 106, May 30, 2007, at 6, www.snl.com/products/samples/media_comm/kvi/sample1.pdf

129 Scott Sleek, *Video on Demand Usage: Projections and Implications*, Pike & Fischer, October 2007, www.broadbandadvisoryservices.com/researchReportsBriefsInd.asp?repId=541

130 Matt Stump, *Kids' TV Rules on VOD*,"Multichannel News, March 6, 2006, www.multichannel.com/article/CA6312983.html

131 *Id.*

132 Comcast Corporation, Press Release, *Comcast On Demand Tops Three Billion Views*, Press Release, September 6, 2006, www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=46

133 Comcast Corporation, Press Release, *New National Survey Finds That On-Demand Television Services Have Positive Impact on Family Viewing Habits*, March 14, 2006, www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=84

134 Daisy Whitney, *Kids Get Their Way on TV*, Advertising Age, March 13, 2006.

d. Computing Devices & Expanding IPTV Options

Many of these same content management tools are increasingly being bundled into PC operating systems, interactive devices, online systems, and even video game consoles.

Microsoft's Windows Media Center software, for example, offers users sophisticated DVR tools to record and catalog their favorite programming.[135] Similarly, Myth TV is free open source software that, along with an inexpensive TV capture card, gives computers DVR functionality.[136] Microsoft's Xbox 360 video game console also allows consumers to download television and other video programming, and Sony is planning to expand the VOD offerings for its PlayStation 3 game console.

Internet protocol television, or "IPTV", refers to a broad class of services that utilize Internet protocols to transmit digital video signals to the public.[137] Many of the new services and technologies described above, such as VOD, are built on IPTV platforms. IPTV offers the potential for much greater capacity, configurability, and interactivity than traditional television distribution and storage methods.[138]

e. Falling Prices and Hyper-Tailored Content

"What's clear is the way we watch TV has changed, and greater change is coming," concludes *Buffalo News* reporter Stephen T. Watson.[139] Indeed, this video empowerment revolution will continue and expand. As Exhibit 5 makes clear, the prices of these video technologies will continue to fall rapidly. Very soon, almost any family that wants these technologies will find them within their reach. Already, as of September 2007, TiVo's most popular DVR cost just $99.99 and its high-definition unit has a price tag of just $299.99. That is stunning considering that just a few years ago, top-of-the-line DVRs had far fewer capabilities, but were selling for well over $1,000.

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135 www.microsoft.com/windowsxp/mediacenter/default.mspx and www.microsoft.com/windows/products/windowsvista/features/details/mediacenter.mspx

136 www.mythtv.org

137 Nate Anderson, *An Introduction to IPTV*, Ars Technica, March 12, 2006, http://arstechnica.com/guides/other/iptv.ars/1.

138 "Essentially, IPTV has the capability of condensing down the multiple channels of conventional cable and satellite television down into one or two video-on-demand streams. What's more, IPTV holds the promise of lots of additional content, such as statistics pop-up boxes during sporting events, extra information about the show you're watching, integrated IM clients, and whatever other added-value widgets content providers and users can dream up." *Glenn Derene, Buzzword: IPTV*, Popular Mechanics, Jan. 17, 2007, www.popularmechanics.com/blogs/technology_news/4212160.html .

139 Stephen T. Watson, *Taking Control of the TV as DVRs Take Over*, Buffalo News, Aug. 28, 2007.

Exhibit 5:
Projected Average Prices for Selected Video Technologies

	2003	2008 (est.)	% price reduction
VCRs	$63	$46	**-27%**
DVD players	$123	$90	**-27%**
DVD recorders*	$271	$155	**-43%**
DVRs	$261	$160	**-39%**
IPTV	$175	$119	**-32%**
Source: **Consumer Electronics Association, *U.S. Consumer Sales and Forecasts, 2003-2008,* July 2007. *Note: First year of DVD recorder data is for 2004.**			

Moreover, because many multichannel video operators essentially subsidize the cost of DVRs for their customers, it means that it will be very easy for every subscriber to have at least one in their home. "Before DVRs were a premium offering," notes Steve Wilson, principal analyst for consumer video technologies with ABI Research. "Now they're a standard offering."[140]

Importantly, as these technologies grow more sophisticated they will also become more user-friendly.[141] For example, TiVo already offers a feature called "TiVo Suggestions" that recommends shows users might enjoy based on their past programming choices. And TiVo's "Universal Swivel Search" tool lets users engage in Google-like searches of their video programming lineup to find programs that match their preferences.[142]

Such tools and features will be further refined in coming years to allow DVRs and other IPTV devices to better "learn" a user's preferences and help them build a library of programming that is right for them and their families. At some point very soon, we might even be able to speak to these machines and communicate our preferences even more clearly. One might imagine a "conversation" with your DVR in the near future that goes something like this: "I only want my kids to see shows like *Blue's Clues, Barney, Sesame Street,* and *Dora the*

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[140] Quoted in John P. Mello, *DVR Market Penetration: Riding a Provider-Powered Wave*, E-Commerce Times, Sept. 26, 2007, www.ecommercetimes.com/story/trends/59497.html.

[141] "As for features, only time will tell what companies think up," notes Andrew D. Smith of the Dallas Morning News. Andrew D. Smith, *Watch for More Choices from Your Cable TV Box*, Dallas Morning News, July 31, 2007, www.dallasnews.com/sharedcontent/dws/bus/ptech/stories/DN-cablebox_31bus.ART0.State.Edition1.35ed73d.html.

[142] www.tivo.com/mytivo/domore/swivelsearch/index.html

Explorer. I like shows that help develop language and musical skills such as those. But I definitely don't want my kids to see any shows that are rated above TV-Y, or that have profanity, or that have a lot violence in them." After hearing your commands, the DVR then retrieves a list of shows that satisfy your criteria and you refine it to ensure that it's right for your kids.

In the future, there will also be many ways for independent organizations to "map" their content preferences onto digital empowerment devices. That is, organizations that independently rate or label media programming will be able to offer their content recommendations to media distributors so that viewers can call up shows approved by those groups. This is already happening today. For example, in March 2006, TiVo announced a partnership with the Parents Television Council, the Parents Choice Foundation, and Common Sense Media to jointly develop TiVo "KidZone." Using ratings and information created by those groups, KidZone allows parents to filter and record only the content that those groups deem appropriate.[143] As more content gets "tagged" by third-parties, one can image a future of customized programming searches that allows parents to align their family's viewing options with recommendations from organizations they trust.

VII. The Commission Should Tread Cautiously in Regulating Children's Programming and Advertising

In discussing the relevancy of the Children's Television Act (CTA) of 1990 to the emerging media landscape, the Commission notes that "The CTA's commercial limits apply only to broadcast, cable, and satellite television" and then asks:

> To what extent are children exposed to excessive and exploitative advertisements on media other than television? What actions, if any, should government take to create incentives to limit the exposure of children to advertisements and to promote associated policies, such as the separations policy, on these other media?[144]

And with regard to the CTA's commercial advertising stipulations, which limit the amount of televised advertising time allowed during children's programming, the Commission asks:

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[143] Saul Hansell, *TiVo to Offer Tighter Rein on Children's Viewing*, New York Times, March 2, 2006, www.nytimes.com/2006/03/02/technology/02tivo.html?_r=1&oref=slogin

[144] *Empowering Parents Notice*, *supra* note 1, ¶ 38.

> We invite comment also on the extent to which parents are concerned about exposure of children to inappropriate content within advertisements on various media, such as offensive language, sexual content, and violence. To what extent are commercials containing inappropriate content aired during children's television programming or during general audience programming that may be viewed by children, such as sports programming? Is it feasible to block advertisements that may be inappropriate for children on various media platforms?[145]

The Commission should tread cautiously here because of the grave danger an expansion of advertising regulation would pose to both the First Amendment and the viability of advertising-supported media platforms. As Congress recognized in adopting the Children's Television Act in 1990, "the financial support of advertisers assists in the provision of programming to children."[146] This was, if anything, a grave understatement, for advertising has become increasingly important as a source of financial support for content in the digital age because the proliferation of programming choices in a world of media abundance has eroded—if not completely eliminated—the pricing power of content producers.

A. Increased Regulation of Advertising Could Have a Negative Impact on the Provision of Children's Content

Whatever one thinks of advertising, there is no denying the fact that much media content is funded, and sometimes *exclusively* supported, by it. That is particularly true of much of the children's programming outlined above. Advertising support is especially important for online media operators who, at least so far, have struggled to find subscription or paywall models that work well enough to sustain their offerings to consumers.

More generally, consumers (including parents and children) can benefit from advertising and marketing in at least three ways (even if they don't always appreciate it):

- Advertising keeps markets competitive and keeps competitors on their toes as they must constantly respond to challenges by rivals having better or cheaper services. This is true even for children's products, such as toys. Advertising provides its greatest benefits precisely where children and their parents can do the least for themselves: forcing the market to provide better products more cheaply.

- As a result, advertising keeps prices low (or at zero) for many media, entertainment and educational offerings.

- Finally, advertising provides important information and signals to consumers about goods and services that are competing for their allegiance. This helps solve an otherwise intractable information problem that would go unsolved without advertising's claims and counter-claims about goods and services.

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[145] *Empowering Parents Notice*, *supra* note 1, ¶ 40.

[146] *Children's Television Act*, *supra* note 11, § 101(3).

This last point should not be under-estimated. Advertising itself is an important type of speech that communicates relevant information to the public. As Nobel laureate economist George Stigler pointed out in his now legendary 1961 article on the economics of information, advertising is "an immensely powerful instrument for the elimination of ignorance."[147] And as advertising scholar John Calfee has argued, "advertising has an unsuspected power to improve consumer welfare" since it "is an efficient and sometimes irreplaceable mechanism for bringing consumers information that would otherwise languish on the sidelines."[148] More importantly, Calfee argues:

> Advertising's promise of more and better information also generates ripple effects in the market. These include enhanced incentives to create new information and develop better products. Theoretical and empirical research has demonstrated what generations of astute observers had known intuitively, that markets with advertising are far superior to markets without advertising.[149]

Today, advertising is a major media industry business model on which a considerable portion of our media landscape depends. Heavy-handed regulation could threaten the diversity and dynamism of this media landscape.

A single statistic should help to put children's advertising in perspective: The FTC recently reported that at least $1.6 billion was spent on advertisements just for promoting food and beverages to children and adolescents in the U.S. in 2006.[150] That number is *four times* the entire budget for the Corporation for Public Broadcasting, which produces far more than just children's programming.[151]

Simply put, there is no free lunch—not even when it comes to children's programming. Consumers (including parents) can either pay for ad-free content as in a DVD or ad-free subscription service or they can use empowerment tools such as described below to skip or block ads they find objectionable—or *all* ads.

B. Fears about Advertising's Effect on Society and Children are Typically Greatly Overstated and Largely Conjectural, While its Benefits are Understated

The FCC acknowledges, in passing, that advertising isn't always evil when it asks: "Can [new forms of advertising such as interactive advertisements, including advergames, and embedded advertisements, as well as behavioral and viral advertising campaigns] have a positive impact if the advertisement is for something beneficial, such as nutritious food?"[152]

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147 George Stigler, *The Economics of Information*, Jour. of Political Economy, Vol. 69, No. 3, at 213 (June 1961).

148 Calfee, *supra* note 50, at 96.

149 *Id.*

150 FTC's 2008 report, *Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation*, at ES-1-2, www.ftc.gov/os/2008/07/P064504foodmktingreport.pdf

151 Corporation for Public Broadcasting FY 2010 Operating Budget, www.cpb.org/aboutcpb/leadership/board/resolutions/090915_fy10OperatingBudget.pdf

152 *Empowering Parents Notice*, *supra* note 1, ¶ 36.

Any discussion of the effects of advertising on children should begin by first recognizing, as Calfee concluded after an extensive survey of several decades of scientific literature, "by the age 10 or so, children develop a full understanding of the purpose of advertising and equally important, an active suspicion of what advertisers say."[153] This healthy suspicion grows into intense skepticism among older youths.

Indeed, as Calfee notes, a 1994 literature review published by the US federal government's National Institute for Alcoholism and Alcohol Abuse (NIAAA), concluded that "the general dislike and skepticism for advertising may result in adolescents tuning out most advertising they are exposed to, and may result in increased vigilance of advertising claims. This could result in adolescents being *less* influenced by advertising than adults."[154]

In the 1960s and 70s, "Advertising to children came to be seen as profoundly different from advertising in general, bereft of advertising's usual benefits and carrying more than the usual costs. The implication was that children and their families should be protected from receiving any advertising directed to children at all."[155] This perception led the Federal Trade Commission to launch a crusade against advertising on children's programming, as Calfee explains:

> In the late 1970s, the FTC staff proposed a ban on all television advertising to children under the age of 8, and a ban on television advertising for sugared products targeted at children aged 8 through 12. This proposal never came close to enactment. The *Washington Post* editorial page, normally a friend of FTC regulation, declared that the agency was trying to become the 'national nanny.' Criticism of FTC overreaching became widespread. Fighting to preserve its very existence, the FTC soon dropped its children's advertising scheme.[156]

Since this regulatory disaster, economic literature has recognized that "Advertising to children, so often believed to be an exception to rule that advertising makes markets work better, actually provides one of the more compelling examples of the benefits of advertising."[157] Even in the case of young children, advertising has dramatically driven down the prices of children's toys by making markets more competitive:

> Sellers advertised their brands directly to children. The children asked their parents to buy the toys they saw on TV without caring how much they cost. The parents went to the store looking for the brands their children wanted. Then what happened? A lot of people might assume that the parents encountered

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153 Calfee, *supra* note 50, at 59.

154 *Id.* at 61 (citing David W Stewart & Ronald Rice, *Non-traditional Advertising and Promotions in the Marketing of Alcoholic Beverages*, in Susan E Martin, ed. Research Monograph No 28, *The Effects of the Mass Media on the Use and Abuse of Alcohol* (1995), at 228) (emphasis added).

155 *Id.* at 60.

156 *Id.* at 60 (citing Susan Foote & Robert Mnookin, '*The "Kid Vid" Crusade'*, 61 (1980), *available at* http://www.nationalaffairs.com/public_interest/detail/the-kid-vid-crusade).

157 *Id.* at 64.

> higher prices because demand had been increased through advertising targeted at an ignorant audience (children). But this is another case where popular expectations are mistaken. One must take into account the competitive process. The ads ratcheted up competition at the retail level, so much so that parents in search of heavily advertised toys actually found lower prices. It was a remarkable example of the indirect benefits of advertising, and it should be much better known than it is today.[158]

Calfee explains in detail how the FTC's victory over the FDA in allowing food manufacturers to tout the health benefits with truthful health claims of their products did much to drive demand for, and increase supply of, healthier foods—despite the FDA's decades-long insistence that any product advertised with such claims must be re-classified as a "drug" and subjected to clinical testing so onerous that "health foods" hardly existed before the FTC's courageous defense of the intelligence of ordinary consumers to choose for themselves among truthfully advertised products.[159] As Calfee concludes:

> Once unleashed from its regulatory prison, competitive advertising of health claims for foods proved to be pervasive, relentless (ask anyone in the packaged food business about this) and surprisingly extensive in its effects on information. Health claims induced changes in foods, in non-foods such as toothpaste, in publications ranging from *Consumer Reports* and university health letters to mainstream newspapers and magazines, and of course, consumer knowledge of diet and health.
>
> These rippling effects from health claims in ads demonstrated the most basic propositions in the economics of information. Useful information initially failed to reach people who needed it because information producers could not charge a price to cover the costs of creating and disseminating pure information. And, this problem was alleviated by advertising, sometimes in a most vivid manner.[160]

Thus, advertising plays a critical role in educating all of us—including children—about beneficial products and services. But what is less obvious is how advertising educates us about what Calfee calls "products that aren't perfect" through "less bad" advertising. Calfee describes the virtuous circle through which advertising for even products that are widely viewed as harmful can both encourage manufacturers to make those products better and educate all users, including children, about the dangers of those products—*even when it is not in the collective best interests of an industry to do so*. Most famously, when cigarette advertisers were allowed to advertise, each brand used advertising to emphasize how much "less bad" its products were than its competitors and, as Calfee explains,

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158 *Id.* at 62.

159 *Id.* at 23-29.

160 *Id.* at 33.

> the net result [of recent advertising about the health effects of smoking] was to set the impressionable smoker to wondering whether it was safe even to carry a cigarette in his pocket.' A 1963 book on the history of advertising similarly concluded that "the tobacco companies, aware of the alarm among cigarette smokers, had worked themselves into a corner in their ads and were, in effect, promoting brands on a my-brand-gives-less-cancer-than-your-brand basis."[161]

The point here is not that all advertising, even if entirely truthful, is necessarily beneficial to children on the whole, but that, above and beyond funding free media, advertising tends to work to the benefit of consumers by spreading useful information and driving competition in positive directions even when we least expect it to do so—and that this applies not only for adults but also for children. Concerns that children might be uniquely vulnerable to particular forms of advertising should be addressed by the FTC (or, in the case of drug ads, perhaps the FDA), not the FCC. And, again, parents have already been empowered to make these decisions for themselves using a variety of existing ad-blocking tools.[162]

VIII. Conclusion

The jurisdictional and First Amendment limitations the Commission faces in this area restrict its ability to impose regulations mandating advanced blocking technologies, universal ratings, restrictive parental control defaults, or even new restraints on commercial advertising. In light of this, the Commission would be wise to avoid any attempt to expand its regulatory authority. Instead, the Commission should refocus its energies on a significant public education campaign and media literacy efforts.[163]

As the Commission noted in its *Empowering Parents Notice*, "Some experts view increased media literacy and education for parents, teachers, and children as a key way to enable children to enjoy the benefits of electronic media while avoiding the potential harms."[164] Indeed, that's the more constructive path for the Commission to take. For example, there's no reason the agency couldn't create a compendium of the existing parental empowerment tools and rating systems and place that information on its website. The Commission could also create or sponsor public service announcements (PSAs) and tutorials that would run on major media outlets. Education is the low-cost, constitutionally "less restrictive," and most long-lasting solution to the concerns the Commission is addressing in this matter.

The Federal Trade Commission has led the way in this arena, most notably with its "You Are Here" campaign[165] and "OnGuard Online."[166] Working together, the FTC and FCC could do

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[161] *Id.* at 50.

[162] *See supra* Section IV.F.

[163] In 1996, the Supreme Court struck down a Rhode Island ban on the advertising of alcohol prices because less restrictive alternatives where available to the state, such as an educational campaign or counter-advertising. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507-08 (1996).

[164] *Empowering Parents Notice*, *supra* note 1, ¶ 50.

[165] www.ftc.gov/YouAreHere

much to help educate parents and children and thus "encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services," as Congress declared back in 1996.[167] Education and empowerment remains the best way for the government to help parents and children take advantage of the "unique opportunities for cultural development, and myriad avenues for intellectual activity."[168]

In light of the FCC's extremely limited jurisdiction in this area, the Commission should continue what it began with its *Child Safe Viewing Act Notice* by expanding information and education about existing tools and rating systems and encouraging parents to use these tools and methods and to talk to their children about appropriate media use. Beyond that narrow Congressionally-sanctioned mission, the Commission should tread cautiously.

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166 www.onguardonline.gov

167 47 U.S.C. § 230(b)(3).

168 47 U.S.C. § 230(a)(3).